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IN THE

Supreme Court of the United States

October Term, 1965

NO. 646

WARREN J. ADAMS and TEXAS SCHOOL OF PRACTICAL NURSING, INC., *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 18, 1965.

OPINIONS BELOW

An opinion of the District Court on sufficiency of the indictment is reported at 210 F.Supp. 716 and is reproduced in the Appendix here, page 1. The opinion of the Court of Appeals is reported at 347 F.2d 665 and is reproduced herein in the Appendix, page 3.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1965, and is reproduced in the Appendix to this petition. A timely petition for rehearing was denied on August 6, 1965 (Appendix, page 11). On August 27, 1965, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari in this case to and including October 5, 1965. This Court has jurisdiction to review the judgment herein by writ of certiorari under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Can persons who openly engaged in the business of selling a correspondence course in practical nursing be convicted of wilfully engaging in a "scheme or artifice to defraud" under the federal Mail Fraud Statute on the basis of representations in their literature which they made concerning the use and value of their course where (a) the same literature had been submitted to the Federal Trade Commission, and (b) where the FTC had found that similar representations containing a similar practical nursing course were not unfair or deceptive practices in commerce?

2. Can a conviction of violating the federal Mail Fraud Statute be based solely on the opinion testimony of expert witnesses that the correspondence course in practical nursing offered by the defendants was valueless because practical nursing could not be taught through correspondence, where other equally qualified experts testified that practical nursing could be taught in this manner, and the defendants' course was adequate to do the job?

3. If the Mail Fraud Statute (18 U.S.C. §1341) is construed as authorizing criminal convictions based upon such disputed matters of opinion, is it to that extent unconstitutionally vague?

4. Where a state has enacted legislation which provides for the licensing only of those practical nurses who meet certain training requirements but expressly allows persons who are not so licensed or trained to engage in practical nursing so long as they do not hold themselves out as being licensed, may prosecution under the Mail Fraud Statute be used as a device for establishing minimum standards for the training of practical nurses?

5. Is the indictment sufficient to charge an offense in view of (1) its allegations of medical opinion in a field of disputed nomenclature, and (2) its erroneous allegations concerning underlying state law?

6. Was the evidence sufficient to support the conviction?

STATUTES INVOLVED

The statutes involved are:

(1) The Mail Fraud Statute, 18 U.S.C. §1341, printed in the Appendix here at page 14.

(2) Vernon's Annotated Civil Statutes of Texas, Article 4528c, the Licensed Vocational Nurses Act, Chapter 118, Acts of the 52nd Legislature (1951) reproduced here at Appendix, page 12.

(3) Federal Trade Commission Act, 15 U.S.C.A. §55(a), reproduced here at Appendix, page 13.

STATEMENT OF THE CASE

1. *Background*

The petitioners in this case are Warren J. Adams, an individual, and Texas School of Nursing, Inc., a corporation chartered by the State of Texas "to maintain and operate a school of practical nursing." (Gov't. Ex. 19A). The corporation has been in existence since 1950, and Adams has been employed by it since that time, first as sales manager and, from 1952, as director. (R. 977-78).

Since its founding, the School has offered a correspondence course in "practical nursing". A "practical nurse", sometimes called an "auxiliary nurse", is someone with less training and education than a professional registered nurse, who performs the less complex tasks of nursing, usually under the direction of a physician or a registered nurse. Practical nursing has long been practiced on a broad scale, but until quite recently it was virtually unregulated. By 1944, however, 15 states had provided by statute for the licensing of practical nurses. By 1950, the number had reached 31. Today all states have some sort of licensing system for practical nurses.[1] In only six states, however, usually referred to as the "mandatory states" is a license required for the practice of practical nursing. All other states, usually referred to as the "permissive states", provide for "licensed" practical nurses but also provide that others may offer to and perform nursing services for hire as long as they do not use the specified statutory designation.

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[1] West and Crowther, **Education for Practical Nursing, 1960** (National League for Nursing, 1960).

Despite these licensing provisions, a great amount of practical nursing is still performed by unlicensed nurses. In 1946, for example, it was estimated that there were 250,000 persons who were nursing for hire, although the total of all licenses issued was only 31,000.[2] There were also at that time at least 100 commercial schools which prepared practical nurses through classroom lectures, demonstrations or correspondence.[3]

The movement toward licensure and the improvement of standards in practical nursing has been marked by much controversy which has been at once a debate over proper training and standards and also, a quarrel over nomenclature. Originally, the nursing profession opposed the training and licensing of practical nurses[4] but in recent years this attitude has changed. Only a few states, however, have accepted the now current view of the organized nurses that only those who have graduated from an approved practical or vocational nursing school should be permitted to nurse for hire and that only approved schools have educational value.[5] As was recently said by the Dean of the University of California School of Nursing: "There are widely differing concepts among nurses themselves, among physicians, hospital administrators, and the public,

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[2] Deming, **Practical Nursing and The Changing Professional Attitude**, 46 American Journal of Nursing, 386 (1964).

[3] West and Crowther, **op. cit. supra** at note 1, p. 20.

[4] Deming, **Practical Nursing Then and Now**, 50 American Journal of Nursing, 621 (1950).

[5] For a recent examination of a failure of a part of this effort see the description in 63 American Journal of Nursing, No. 9 (Sept. 1963) pp. 38-40, of the failure of the Illinois legislature to enact legislation making licensing mandatory and prohibiting the operation of correspondence schools of practical nursing.

about the functions of nurses and about how nurses should be prepared for these functions."[6]

Some advocates of elimination of unlicensed practical nurses as well as correspondence schools have reduced the debate to an argument over nomenclature by blindly insisting that practical nurses do not exist. For example, a Hearing Examiner of the Federal Trade Commission had occasion recently to comment in a case involving a practical nurse correspondence school that:

> ". . . confusion was . . . enhanced by the fact that many of the expert witnesses in the nursing field . . . all of whom were registered professional nurses in various executive capacities, testified that a practical nurse was an LPN and refused, contrary to the fact now established in the record, to recognize the existence of unlicensed practical nurses in spite of the fact that the term practical nurse was used to designate them for many years prior to the existence of any licensure laws."[7]

As we shall see, petitioners have become embroiled in the same dispute over policy and nomenclature and have been convicted of crime for espousing one view instead of another.

The petitioners' school is located in Dallas, Texas. Texas is a permissive state. Under the Texas statute, which was passed in 1951, a category called "Licensed Vocational Nurse" or "L.V.N." was created. Licensed Vocational

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[6] Nahm, **Nursing Dimensions & Realities**, 65 American Journal of Nursing, No. 6, (June, 1965) p. 96.

[7] **Comments of Hearing Examiner, Robert L. Piper, in the Matter of W. Lane Schulze**, 54 FTC 1754, at p. 1758. (Nov. 18, 1957).

Nurse Act, Vernon's Annotated Civil Statutes, Article 4528c. By using the title "Licensed *Vocational* Nurse" or "L.V.N." the statute avoided confusion with unlicensed "practical" nurses. The statute by its terms expressly provides that "the provisions of this Act shall not apply to . . . persons who do not hold themselves out to the public as being Licensed Vocational Nurses or using the abbreviation L.V.N." The clear purpose of the exclusion was to leave unfettered the whole field of practical nursing which exists in Texas as it does elsewhere. An opinion of the Texas Attorney General, introduced here by the Government as Exhibit 44 (Exhibit R. 89-92) analyzes the above Texas statute thus:

> "From these two sections above quoted, it is seen that we have then a fourth classification of nurses, they being the ones that do not fall under the category of a registered nurse, a graduate tuberculosis nurse, or a licensed vocational nurse. But, nurses of the fourth classfication can neither use the title of registered nurse, graduate tuberculosis nurse, or licensed vocational nurse, nor hold themselves out at any time to be in any of the first three categories."

The Texas School of Nursing did not prepare its students to become "Licensed Vocational Nurses" under the Texas statute. Its purpose, rather, was to provide an education in the fundamentals of practical nursing for people who did not wish to become an L.V.N., who could not meet the age, educational, or other requirements for L.V.N. training, or who were unable for financial or other reasons to devote the year of full-time study and training which the statute requires for an L.V.N.

The course offered by the school centered around a series of lessons, review questionnaires, and examinations, all of which are in the record as Defendants' Exhibit 37.[8]

These materials cover the following subjects: bedmaking, temperature, pulse and respiration, baths, personal care and comfort of the patient, enemas, first aid, communicable diseases, hypodermics, charting, internal and external irrigations, medical terminology, anatomy and physiology, the cardiac patient and oxygen therapy, geriatrics and the chronically ill patient, administration of medicines, orthopedics, massotherapy, phychiatry, dietetics, preoperative surgery, obstetrics and gynecology, the male reproductive system and obstetrical nursing procedures, pregnancy, labor and childbirth, infant care.

The school's method of operation was essentially as follows: It placed small advertisements in public newspapers announcing the availability of a "short, inexpensive course" in practical nursing, and inviting inquiries. (Gov't. Ex. 18A) When a prospective student requested more information, the request would be acknowledged by letter (Gov't. Ex. 7), and followed by a personal visit by a salesman called a "Student Counselor" who would orally explain the program and also give the prospect a brochure which described the job opportunities available to practical nurses, the type of program offered by the School, etc., and which contained excerpts from letters from prior students who had found the course rewarding and had succeeded in obtaining jobs after graduation from the school. If the

[8] The course of instruction was not printed in the record in the Court below but the parties stipulated that copies could be lodged with the Court for its convenience. (R. 1594c) Nine additional copies of the course have similarly been filed with the Clerk for the convenience of the members of this Court.

prospect decided to take the course, she would sign an "enrollment application" (Gov't. Ex. 6A) and complete a "confidential qualification report" on her education, employment, and physical condition. After acceptance of the student, there then followed the usual mailing of the lessons one by one, the return of the review questionnaire at the end of each lesson, the grading, the periodic examination, and the final examination. The quality of instruction and teaching effort will be referred to later.

Beginning in October, 1954, the School periodically received from the Federal Trade Commission requests for "representative copies of all advertising used during the past six months . . ., including newspapers, magazine advertising, circulars, form letters and catalogues."[9] (R. 1001) The School complied, sending its brochure, its enrollment application, its various form letters, its diploma forms, all the course materials, the newspaper advertisement, the memorandum to student counselors, etc. (R. 1001-1010)

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[9] A certified copy of the correspondence between the Federal Trade Commission and the School in the files of the FTC was produced at the trial (Defendants' Exhibit 41, R. 995). It was stipulated in the Court below that Defendants' Exhibit 41 need not be printed on appeal but that counsel might refer to it in its original form. (R. 1594c) The original exhibit has been filed with the Clerk of this Court as it was lodged with the Clerk of the Court of Appeals. Defendants' Exhibit 41 shows that the FTC made such requests in 1954, 1958 and 1961 (Id., pp. 1, 173, 341) The Commission also asked in 1954 for information regarding the resident training and as to the eligibility of graduates to be employed as practical nurses. (Id., pp. 114-117). In 1958 the Commission also asked the procedure used with respect to prospective students from the "mandatory states" and for the names and addresses of all persons who completed the course and thereafter obtained employment in hospitals as practical nurses. (Id., p. 145) This information was furnished. The School submitted records as to the employment of its most recent graduates and a host of testimonial letters. (Id., pp. 166-295).

The materials submitted to the F.T.C. were the same offered in this case by the Government to prove the so-called "misrepresentations" as to the value and utility of the course.

In 1955, a representative of the FTC requested the School to eliminate from its advertising the word "institutions," which was used in statements to the effect that practical nurses could be employed in hospitals and institutions. The School complied with this request. (R. 1010-11)

Shortly thereafter, a representative of the FTC requested the School to eliminate from its advertising any statements to the effect that practical nurses "earn up to $12 a day." The School complied. (R. 1011)

In February, 1956, the FTC initiated a case that became its leading decision in the field of practical nursing correspondence courses. It issued a complaint against a correspondence school of practical nursing in Chicago and after the usual proceedings first before a Hearing Officer, and later, before the full Commission[10] the final decision was rendered on June 10, 1958. *W. Lane Schulze T/A Chicago School of Nursing*, 54 FTC 1754. The FTC sent a copy of its decision in the *Schulze* case to the Texas School in order that the School would be familiar with the views of the Commission. (Def. Ex. 41, p. 337). It is apparent from that decision that the operations of the Chicago School were essentially similar to those of the Texas school, except that it used the term "auxiliary nurse" in lieu of the term "practical nurse," to avoid confusion with the term "licensed practical nurse" which appears in the Illinois statutes. Such confusion could not arise in

[10] Commissioner Anderson not participating.

Texas, because the Texas law uses the term "Licensed Vocational Nurse" rather than licensed practical nurse. According to the FTC decision, the term "auxiliary nurse" covers both unlicensed practical nurses and nurses' aides.

The Commission's decision shows upon its face a full inquiry into the views of medical and educational experts on the value of practical nursing courses taught through correspondence. The essential holdings of *Schulze* were as follows:

1. It was *not* false or misleading for the respondent to represent its correspondence course as being a "complete" course in practical or auxiliary nursing, even though the course did not fulfill the statutory requirements for a license, and even though the course offered no actual hospital or clinical experience.

2. It was *not* false or misleading for the respondent to advertise that there is a need for auxiliary nurses and that graduates of its correspondence course could obtain jobs as auxiliary or practical nurses, even though some hospitals and other institutions do not hire unlicensed practical nurses.

3. It was *not* false or misleading for the respondent to advertise that one can become an auxiliary nurse without having a high school education.

4. It was *not* false or misleading for the respondent to advertise that doctors rely on its graduates as auxiliary nurses, since it was shown that such graduates actually found employment in that capacity.

5. It was *not* false or misleading for the respondent to advertise that its graduates would obtain employment at unusually good wages, since it is shown that many did obtain employment at wages which are considered good for practical nurses.

6. It was *not* false or misleading for the respondent to advertise that its course was endorsed by physicians, since in fact physicians had endorsed it.

7. It was *not* false or misleading for the respondent to represent that the certificates it awarded to its graduates were of value to them in finding employment as auxiliary nurses, since no legal prerequisites exist for such employment and graduates had been successful in becoming employed upon completion of the course.

8. Finally, the Commisison held that it *was* misleading for the Chicago School to advertise that its graduates were eligible for employment as auxiliary nurses without specifically stating that in six states a practical nurse must be licensed, and the course offered by the school did not qualify its student for such license. Accordingly, the Comission entered an order requiring the Chicago School to make clear in its advertising that its graduates would not be eligible for employment as practical nurses in those states requiring practical nurses to be licensed.

Shortly after this decision was issued, the FTC served on the Texas School of Nursing a statement of charges under the Federal Trade Commission Act, obviously based on the *Schulze* decision, claiming that the School had violated the Act by failing, in its advertising, to state expressly that students completing its course would not be eligible for employment as practical nurses in Arkansas, Idaho, Louisiana, Nevada or New York, or in hospitals in the State of Rhode Island, or in any other state which may subsequently enact laws requiring practical nurses to be licensed. (R. 1033-34). The attorney for the School responded that the School did not advertise in such states. (Def. Ex. 41, p. 333). Adams testified in this trial that the School did not seek students from any of those states

(R. 1035) and would not enroll them until a letter informing them that they could not receive a license or practice in such a state was sent. (R. 1084; Def. Ex. 42). A copy of the form letter sent to applicants from mandatory states had been sent to the FTC. (Def. Ex. 41, p. 132). No other charge was ever made against the School by the FTC, although the FTC had a complete file of all of the School's materials.

In 1959, the Post Office Department began an investigation of the School. (R. 951). An inspector sent questionnaires to a number of the School's former students and placed a "mail cover" on the School's mail. (R. 951, 954) When this came to the attention of the School, it requested a conference with the inspector. (R. 954) At that conference in 1959, informal comments of the inspector led the School to make certain changes in its enrollment application and in its "student verification questionnaire." The School was also led to eliminate a reference to the National Council of Practical Nursing Schools from its salesmen's kits. However, nothing at that time was said about the quality or value of the defendants' course.

Three years later, on August 30, 1962, the indictment in this case was returned. It is primarily an assault on the value of the course. But in addition to this feature the indictment made certain additional claims: In the first six counts it claimed that the School engaged in a scheme to misrepresent to students that they would be eligible to take state examination leading to licensure as Licensed Vocational Nurses in Texas and similar examinations in other states. Further: In the last twelve counts it claimed that the School engaged in "wilful" concealment of certain matters, namely,

concealment of the fact that graduates would not be qualified to take state examinations, that graduates "would not be eligible for employment as vocational nurses in Texas and California or as practical nurses in other states"[11] and that the School "was not an accredited institution."[12] A few other trimmings were included by way of casting reflection upon the School and its operations, about which more will be said later. However, the bulwark of every count of the indictment was the attack upon the value of the practical nursing course, i.e., the charge that the School had falsely stated that its graduates "would be highly trained and well qualified practical nurses," "would be eligible for hospital employment in the direct attendance and care of the sick," would be "qualified to give bedside care of the sick and carry out treatments under instructions of medical doctors," and "would be readily in demand for employment in a skilled capacity as a nurse at a greater pay rate than nurse's aide, and earning up to $12 per day." Petitioners were also accused of falsely claiming that they "maintain the highest of standards in facilities, staff, and personnel, and in the quality of instruction."

These allegations, it will be recognized, are practically the identical allegations which were rejected in the Federal Trade Commission decision in the *Schulze* case, *supra*. And at the trial, it proved out that there was no claimed difference in the courses, facilities, or facts in the two cases.

[11] The demanded disclosure is legally wrong and factually untrue. As the FTC summarized in the **Schulze** case, 43 "permissive states," including Texas, allow unlicensed practical nurses to nurse for hire. 54 FTC at p. 1762.

[12] It was stipulated that neither public nor private accreditation was available in Texas for any school training practical nurses.

Just as the professional nurses testified in *Schulze* that "in their belief such demonstration and return demonstration were necessary in order to teach . . ." nursing, 54 FTC at p. 1764, and that practical nursing cannot be taught through a correspondence course, just so the Government's witnesses claimed in this case that in their professional opinion nursing must be taught by on-the-job training and cannot be taught by a correspondence course. Therefore, the Government claimed that it was fraudulent for the School to say that its graduates would be "highly trained and well qualified practical nurses" or to make similar claims. As the Court of Appeals said: "The Government's attack was, and is, primarily a contention that appellants fraudulently held out that graduates of their course would be highly trained and well-qualified practical nurses . . . while in fact the correspondence school offered only limited training with no practical experience. . ." 347 F.2d 665, at 666, Appendix pp. 4-5 *infra*. And this main thrust of the Government's case was submitted to the jury upon instructions which authorized the jury to convict petitioners on the basis of these medical and educational shortcomings alone. This submission was made over proper objection which was well understood by the Court below.

That the jury did convict upon this basis alone is demonstrated by the guilty verdict on count 18 of the indictment which alleged the mailing of a small advertisement to the Houston Post at Houston, Texas, on August 11, 1962. As of 1962, all of the postal inspector's complaints of the defendants' forms pertaining to the School's representations and non-representations had been cured three years before, in 1959. Therefore, the only basis for conviction was the jury's agreement with the Government that a practical

nursing course by correspondence is useless and that it amounts to fraud to say that a graduate "would be a highly trained and well qualified practical nurse."

2. *The Indictment*

The indictment (R. 1464) contains 19 counts, 18 alleging violations of the Mail Fraud Statute, 18 U.S.C. §1341 and one alleging a conspiracy to violate the statute.

The first six counts allege a single "scheme and artifice to defraud," pursuant to which the mails were used on six specified occasions. This alleged scheme was to obtain money through the sale of the correpondence course by means of the following "false and fraudulent pretenses, representations, and promises":

> "(a) that persons who completed the aforesaid course of instruction would be highly trained and well qualified practical nurses;
>
> "(b) that the defendants would assist such persons in obtaining employment in the nursing profession as a professional nurse;
>
> "(c) that persons completing the said course of instruction would be eligible for hospital employment in the direct attendance and care of the sick;
>
> "(d) that persons completing the said course would be qualified to give bedside care of the sick and carry out treatments under instructions of medical doctors;
>
> "(e) that the defendants maintain the highest of standards in facilities, staff, and personnel, and in the quality of instruction;
>
> "(f) that the Texas School of Practical Nursing, Inc. is, and was at all times mentioned herein, a member of the National Council of Practical Nursing Schools;

"(g) that persons completing the said course of instruction would be eligible to take the examination given by the Board of Vocational Nurses pursuant to the Vocational Nurse Act, Article 4528C, Vernon's Annotated Texas Statutes, and similar examinations administered and required for persons to engage in practical or vocational nursing in states other than the State of Texas;

"(h) that persons who by reason of completing the said course of instruction would be in demand for employment and would be readily employed in a skilled capacity as a nurse at a greater pay rate than nurse's aide, and earning up to $12.00 per day;"

The next 12 counts, 7-19, alleged a slightly different "scheme and artifice to defraud" which involved all of the alleged misrepresentations listed above except (g), but which in addition allegedly involved wilful *concealment* of the following facts:

"(a) that upon satisfactory completion of defendants' course of instruction, said persons were not qualified to take the examination required by state law in order to obtain a state license to practice nursing;

"(b) that persons who satisfactorily complete defendants' course of instruction would not be eligible for employment as vocational nurses in the States of Texas and California and would not be eligible for employment as practical nurses in other states of the United States;

"(c) that defendant Texas School of Practical Nursing, Inc. at all times mentioned herein, was not an accredited educational institution."

Count 19 alleged that the defendants conspired to use the mails for the purpose of executing the schemes alleged in the prior counts.

On October 8, 1962, defendants moved to dismiss the indictment or, in the alternative, to strike those provisions which alleged as misrepresentations what are really matters of opinion, and those provisions which alleged only non-disclosure rather than affirmative misrepresentations. (R. 1484-85). The motion was denied (R. 1490), and the case proceeded to trial before a jury.

Also, defendants' motion to dismiss the indictment (R. 1484-85) and their timely Motion in Arrest of Judgment (R. 1544-53) directly challenged the legal sufficiency of the so-called wilful concealments on the ground that they rested upon erroneous state law and because they were not matters which anyone could know in advance would constitute actionable criminal fraud by omission or non-disclosure.

3. *The Evidence*

There was, of course, no dispute at the trial that the School used the mails in the conduct of its business. The issue, rather, was whether there existed any kind of a scheme to defraud within the meaning of the Mail Fraud Statute. The Government made a stab at proving, in support of the first six counts, that a scheme existed to misrepresent that the School's graduates would be eligible to take state examinations. As we demonstrate later, the evidence did not stand up on this matter, so petitioners confidently assert that the evidence to support this claimed scheme of affirmative misrepresentation was insufficient in law. As to the three non-disclosures, the Government did show that the School's literature did not contain the complained-of omissions in at least two of the three instances

and the question which remains is whether such claimed non-disclosures are criminally actionable and whether defendants' omissions were "wilful."

The real guts of the Government's case, however—what the Court of Appeals called the primary contention—did not lie in the alleged misrepresentations and non-disclosures above referred to but in the alleged misrepresentation of the value of the course. The theory of this aspect of the case was that practical nursing could not be taught through a correspondence course, that actual clinical training was essential, that a graduate of the Texas School would be no better qualified for employment as a practical nurse than a person without any training, and that the defendants were therefore perpetrating a fraud by all of their representations that the course had value and would prepare persons for a practical nursing career.

The evidence bearing on this aspect of the case consisted primarily of expert testimony. The prosecution presented two registered nurses and one physician who all testified that they had examined the course offered by the School and were of the opinion that it was of no value for the training of practical nurses, primarily because it offered no clinical training with actual patients. (R. 345-47, 360-63, 372, 404-08, 459-63) As pointed out earlier, there is a general movement in the United States to tighten up qualifications in the nursing field and the Government's three expert witnesses adhered doggedly, and blindly, to the view that nursing cannot be taught by correspondence, but only by actual clinical demonstration, and that practical nurses do not, and should not, exist. Small wonder that they would so testify because they represent the officialdom of the interested associations. The Government's three witnesses

were the Chairman of the Harris County Medical Society (Dr. Thomas L. Royce, an eye doctor, who did not even claim any particular competence in the field of teaching or supervising of nurses); Miss Renilda Hilkemeyer, the President of the Texas Graduate Nurses Association; and Mrs. Janie Rountree Gibson, Director of Training for the State Board of Vocational Nurse Examiners. That was the Government's case.

The defense presented its own experts, whose credentials were at least as good as those of the prosecution's witnesses, and whose testimony was precisely the opposite. These witnesses were Dr. Norman Kaplan, a member of the faculty of the University of Texas Medical School (R. 754-65), Elsie Durham, a registered nurse who teaches in a school which trains Licensed Vocational Nurses (R. 797-807), Nina Shields, another registered nurse with considerable experience as head nurse in a major hospital (R. 830-50), and Dr. Jack Bergfeld, a physician who testified that he served as a training officer for medical corpsmen in the army and that the army used a correspondence course similar to that offered by the Texas School, although "more brief," in the training of medical corpsmen. (R. 927-43) They all testified that a person who took the course and applied herself seriously would be well prepared for practical nursing. According to them, the course has merit and would in fact produce competent nurses for hospitals and for care of the sick under the supervision of doctors. (R. 759-60, 932-33, 936, 942). All agreed the course was complete and covered everything.

In addition, a number of former students of the School testified that they had found the course to be of value, that they had obtained employment as practical nurses, and that

they found themselves adequately prepared for their jobs. (R. 769, 771-73, 785-89, 851-54, 862-65, 881-87, 944-46, 967-70, 1037-38, 1041-42, 1137-39)

In jury argument, the Government prosecutors pounded hard their theory (R. 1257-58):

> "Now Mrs. Renilda Hilkemeyer, Director of Nursing at M. D. Anderson Hospital, Mrs. Janie Gibson, the Board of Vocational Nurses, and Dr. Thomas Royce, immediate past president of the Harris County Medical Association, all testified that in their expert opinion that the course is of no value in teaching nursing because there is no supervised training with real patients and that practical nursing cannot be taught through a correspondence course. That's the Government's best evidence. . . ."

Again, at R. 1358:

> "I'd rather have somebody that didn't know anything about medicine sitting and watching my three and a half year old boy than one of these graduates that thinks she knows everything in this book."

And, finally, the crescendo conclusion: (R. 1364)

> "If that is the kind of standards you want, then turn them loose."

4. *The Verdict and the Instructions*

The defense moved for a judgment of acquittal at the end of the Government's case and at the conclusion of the trial. (R. 625-655, 1195-97). The first time the motion was made it was denied, the second time it was taken under advisement and the case was submitted to the jury.

In charging the jury, the Court stated the following:

> "It is not necessary or essential for the government to prove in this case every element or part of the scheme to defraud alleged in the indictment, but conviction may be had upon proof of sufficient elements or parts so alleged which are adequate to constitute a scheme to defraud. (R. 1376)

This instruction plainly authorized the jury to convict the defendants on all counts, even if they were unable to find any wilful misrepresentation of any objective fact, if they believed the Government's expert testimony rather than the testimony of the defendants' experts as to the value or usefulness of the course.

Throughout the trial, The Trial Court, Ingraham, D. J., thought the Court helpless to protect defendants against conviction based solely upon opinion evidence even though he, himself, flatly disagreed with the Government's evidence. He said: "I disagree with the witnesses who say you can't read something and learn. That is the way most of us learn." (R. 634-35) But, he added, "What I think isn't evidence." Later he stated that when there is conflict in opinion testimony in the medical and educational fields, "it makes a case for the jury." (R. 1196) Still later, in response to the argument that conviction here rests upon a straight conflict of medical opinion the Court said, "It is not unusual to have conflicting evidence in any case, criminal or civil." (R. 1417) As to the defendants' claim that the medical opinion was equally divided, the Court replied, "Who is to say when the evidence is equal? If Jones says 'Yes' and Smith says 'No,' that may sound to you and me like equal pressure from the opposite sides, but you also

have the matter of credibility which the jury and the jury alone decides." Later, in the same discussion the Court said, "Doesn't the jury weigh the evidence of expert witnesses in the same way they weigh the evidence of fact witnesses?" (R. 1418)

Accordingly, the Trial Court instructed the jury, as to the Government's alleged misrepresentations, that it was not necessary or essential for the Government to prove every element or part of the scheme to defraud as alleged but "conviction may be had upon proof of sufficient elements or parts so alleged which are adequate to constitute a scheme to defraud." (R. 1376) To the charge as a whole and to the above paragraph specifically, defendants objected on the ground that the charge authorized the jury to convict upon matters of medical or educational opinion. (R. 1390-1391)

After the jurors retired to deliberate they sent in a note to the Court inquiring that if there is reasonable doubt of the guilt of the defendants in regard to one of the misrepresentations but no doubt of the others, should defendants be found guilty or not guilty? (R. 1394) In response, the Court again read to the jury the objected-to portion of the Court's charge. (R. 1396)

The jury found all defendants guilty on all counts except count 15, which was one of the mail fraud counts. (R. 1541) As stated before, one of the counts on which the defendants were convicted was count 18, which alleged a mailing in 1962, three years after the defendants had promptly conformed to all maters the postal inspector suggested, informing all prospective students, by means of written statements in the enrollment, applications and the

student verification questionnaires, that the course would not qualify them for a license and after deletion of all reference to the National Council of Practical Nursing Schools. The conviction on this count clearly demonstrates that the verdict must have been based not on any misrepresentation concerning licensing, but rather on the Government's theory that the course was of no value in training practical nurses.

After the verdict was in, the Court granted the motion for a judgment of acquittal with respect to one defendant, Opal Christal (R. 1414, 1585), but denied it with respect to the others.

Now we return briefly to a further description of the school's operation and to the events up through 1959. That was the last year in which any claimed irregularity occurred except for the claim of the essential fraud in selling a correspondence course in practical nursing from 1959 to August 1962.

Students who enrolled and were accepted for the course would be mailed their lessons one by one, and required to complete the review questionnaire at the end of each lesson. This questionnaire would be checked by a Registered Nurse at the School, and then returned to the student. If it was unsatisfactory, the student would be asked to restudy the lesson and complete another questionnaire blank. Three times during the course the students would be asked to complete a written examination on the material covered thus far, and at the conclusion of the entire course there would be a final examination. Each student proceeded at her own speed, getting a new lesson upon satisfactory completion of the prior one. At any time

a student wanted further explanation of a point, she could write to the School's head nurse, and an answer would be supplied.

Upon completion of the home study lessons, the student would be invited to come to the School for two weeks of demonstration and classroom review of the entire course. Part of the classroom work would consist of practicing the various techniques of nursing—bedmaking, pulse and temperature taking, giving injections, first aid, etc.—using a rubber dummy generally employed in such courses or, in some instances, working on fellow students. The techniques of preparing formulas for infants were demonstrated by milk company representatives. (R. 833-843). Originally students were also sent, with instructors, to Dallas General Hospital to work with patients. When Dallas General established a program for training vocational nurses, it discontinued this practice and all reference to hospital training was removed from the School's literature (R. 1081).

Students who completed the entire course, including the two-week classroom work, were given a diploma certifying that fact. (Gov't. Ex. 14C). Those who completed the home-study portion, but elected not to take the classroom work, were given a different type of diploma, indicating that they had completed the "prescribed course of training" only. (Gov't Ex. 9C).

The price of the entire program was $216, minus a 10% discount for those who paid in full within 30 days. Students electing not to pay cash could pay $40 down and $15 per month. The School paid round trip bus transportation, up to a maximum of $21.60, for those students who came to Dallas for the two-week classroom program.

The price of the correspondence portion of the course alone was $153.50, payable on the same terms. (R. 988-991). Students who dropped out of the course before completing it were required to pay only the $40 down payment plus $15 per month for the period they were enrolled. (R. 681-82).

The Student Counselors were paid a commission, for each student enrolled, of $30 to $40. They were hired under a detailed written contract which contained several underscored paragraphs requiring the counselors to make no promises or representations not contained in the School's literature, and not to conceal any material facts. (Def. Ex. 33). In addition, a special memorandum was given to each counselor warning him in strong language against making any form of misrepresentation. (Def. Ex. 33). Adams testified that these precautions were taken because he was aware, on the basis of his own experience in the sales field, that salesmen sometimes exceed the truth in attempting to make a sale. (R. 933).

We have previously reviewed the events between 1954 and 1958 leading up to the Federal Trade Commission's directive to the School to improve its literature by affirmatively disclosing that its graduates would not be eligible for employment in the States of Arkansas, Idaho, Louisiana, Nevada, or New York or in hospitals in the State of Rhode Island. A copy of this order taken from Defendants' Exhibit 41, p. 332, is reproduced in the Appendix here, page 14. This order was transmitted from the Federal Trade Commission to the defendants by certified mail on January 15, 1959. (R. 1032) It is in the image of the *Schulze* decision of June 10, 1958, which likewise had been transmitted by the FTC to petitioners. (Def. Ex. 41, p. 337).

In 1959, the Post Office Department began an investigation of the School. (R. 951). An inspector sent questionnaires to a number of the School's former students, and placed a "mail cover" on the School's mail. (R. 951-54). When this came to the attention of the School, it requested a conference with the inspector. (R. 954). At the conference, the inspector suggested that the School make certain changes in its enrollment application and its "student verification questionnaire," a form which was used by the School to obtain certain information from new students.

Among the questions it contained are the following:

> "3. Did our student counselor explain our program to you thoroughly so that you know exactly what we have to offer you?
>
> "4. Did you read the enrollment blank and understand its contents?
>
> "5. Do you understand that our placement service is not a guarantee of work; however we maintain this service at no extra cost to you?" (R. 1017-18)

At the suggestion of the Post Office Inspector, the School revised the questionnaire in 1959, to add the following questions:

> "5. Do you understand that some hospitals and clinics do not employ unlicensed nurses?
>
> "11. Do you understand this course of training does not intend to qualify you as a licensed practical nurse, but is offered for its educational qualities?" (R. 1019-1020)

Also at the suggestion of the inspector, the School added on its enrollment application the words "This course is not intended to qualify you as a licensed practical nurse but is offered for its educational qualities only." (R. 1015-16).

At the same conference, the inspector brought to Adams' attention the fact that an organization known as National Council of Practical Nursing Schools, with which the Texas School had been affiliated and to which references were made in some of the School's literature, had been dissolved. The School immediately eliminated all references to the National Council from its literature. (R. 1053-54).

This was, apparently, not sufficient. On August 30, 1962, Adams, the Corporation, as well as the President of the Corporation and the head nurse, were indicted for mail fraud and conspiracy.

It is to be noticed that the Federal Trade Commission never advised defendants to incorporate affirmative disclosures pertaining to licensure. The postal inspector did make the suggestion with reference to the School's enrollment application and its student verification questionnaire, which suggestion was promptly adopted by the School. No one at any time suggested to the School that it should or must affirmatively disclose that its graduates "would not be eligible for employment as vocational nurses in the States of Texas and California and would not be eligible for employment as practical nurses in other states of the United States." Nor was the suggestion forthcoming from any source that the defendants should disclose that it "was not an accredited educational institution."

As to these non-disclosures, petitioners call attention to the fact that the state law set out in the required disclosure is erroneously stated since it is literally not true that defendants' graduates would not be eligible for employment as vocational nurses in Texas and would not be eligible for employment as practical nurses in other states of the United States. The Government's claim is directly contrary to the finding of the Federal Trade Commission in the *Schulze* case, *supra*, where the Commission ruled:

> ". . . To start with, in 43 states there are no requirements whatsoever necessary for employment as an auxiliary nurse, including practical nurse, nurse's aide, and all other titles, and in six other states there are no requirements, educational or otherwise, necessary for employment as an auxiliary nurse, including nurse's aide and all other titles used, except practical nurse."

5. *The Sentences*

The Court sentenced Adams to 9 months imprisonment to be served plus 5 years suspended, and a fine of $5400 (R. 1583). The corporation was fined $13,600 (R. 1586). David Miller, the President of the corporation, was sentenced to 18 months to be served, 5 years suspended, and a fine of $10,800 (R. 1579).

6. *The Appeal*

The defendants appealed to the United States Court of Appeals for the Fifth Circuit. On June 18, 1965, that court issued an opinion and judgment affirming the convictions. On August 6, 1965, the court denied rehearing.

The opinion of the court, after setting forth the facts and the contentions of the parties, simply states the following:

> "We are of the clear opinion: that the indictment was adequate and legally sufficient; that there was sufficient evidence to support the jury verdict; that none of the assignments and complaints constitute reversible error; and that the judgment should, therefore, be and it is hereby
>
> "Affirmed."

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of "wilfulness" in federal criminal law, under both statute and constitution. Simply stated, that question is whether a businessman who openly conducts a business in a manner which has been held in a published decision of the Federal Trade Commission not to be "unfair" or "deceptive" can be found guilty of wilfully engaging in "a scheme or artifice to defraud" within the meaning of the Mail Fraud Statute.

This jury was authorized to convict the defendants for wilful fraud on the basis of a doctor's and two registered nurses' opinions (called by the prosecutor "the Government's best evidence") to the effect that practical nursing could not be taught through a correspondence course, that the only way to teach practical nursing is through actual clinical demonstration, and that a graduate of a correspondence course would be no better prepared for practical nursing that an entirely untrained person. Similar, almost identical, professional opinion was rejected by the FTC in the *Schulze* case, *supra*, by which these defendants and

the industry in general were advised of the conclusions of those who have "expertise" under the authority of law:

> "While, as respondents concede, it may be more desirable to include actual demonstration and return demonstration in a course teaching auxiliary nursing, this does not mean either that it is necessary or legally required. While it is a requisite of resident courses leading to licensure as a practical nurse in 43 States, it is definitely not required in order to qualify for auxiliary nursing, including unlicensed practical nurses and nursing aides. In view of the undisputed shortage of and need for auxiliary nursing personnel, a requirement that such personnel must take resident courses including demonstration and return demonstration before being eligible for such employment would serve to augment this shortage by eliminating from the field many of the persons now serving in it without such training. While no doubt it would be preferable that all practical nurses be licensed and have such training, it might also be argued that it would be preferable that all nurses be registered professional nurses with their requisite training. For practical reasons, it is better to have the best result possible rather than require the best possible result. The laws of the substantial majority of the States which permit the continued practice of practical nursing without such training demonstrate their recognition of this principle."

It is well established that "conscious knowing intent to defraud is one of the two essential elements of the mail fraud statute." *United States v. Kyle*, 257 F.2d 559, 564 (2d Cir. 1958), *cert. denied*, 358 U.S. 937 (1959). See also *Williams v. United States*, 278 F.2d 535, 537 (9th Cir. 1960). The question here, therefore, is not whether

practical nursing can or cannot be taught through a correspondence course. Rather, the question is whether the defendants can be convicted on opinion evidence of a "conscious knowing intent to defraud" for openly advertising and selling a correspondence course in practical nursing after the Federal Trade Commission had evaluated such opinion and had held such advertising not to be an unfair or deceptive trade practice because practical nursing can be so taught.

A similar question was presented to this Court in *James v. United States*, 366 U.S. 213 (1961). The petitioner in that case had been convicted in the lower courts for wilfully attempting to evade income taxes by failing to report as income certain funds that he had embezzled. An earlier decision of this Court had held that embezzled funds were not taxable income, *Commissioner v. Wilcox*, 327 U.S. 404 (1946), but in *James* the Court re-examined that question and overruled *Wilcox*. Nevertheless, the conviction of the petitioner in *James* was reversed, and three Justices gave this reason for voting in favor of the reversal:

> ". . . we are dealing here with a felony conviction under statutes which apply to any person who 'wilfully' attempts to evade his obligation . . . Wilfulness must therefore include an evil motive and want of justification in view of all the circumstances . . .
>
> "We believe that the element of wilfulness *could not be proved* in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed. Therefore, we feel that

> petitioner's conviction may not stand and that the indictment against him must be dismissed." 366 U.S. at 221-22 (opinion of Chief Justice Warren, joined by Justices Brennan and Stewart) (Emphasis added).[15]

It is plain that this reasoning is equally applicable here. The same element of "wilfulness" which was essential to a conviction in *James* is essential to the conviction in the present case. Indeed, the principle involved in *James* is even more applicable here. The Federal Trade Commission, which has full authority (under 15 U.S.C. §45) to regulate false or misleading advertisement, had asked the petitioners to submit copies of their course and of their literature. The petitioners had complied. The Commission, in order to give the petitioners "guidance" then forwarded to them a copy of the *Schulze* decision. Finally the Commission initiated proceedings against the petitioners to cause them to conform to the *Schulze* decision but took no further action in those proceedings when the School replied that, unlike the school involved in *Schulze*, it did not advertise in "mandatory" states and would not accept enrollments from students in mandatory states without first specifically advising them that the petitioner's course would not qualify them for a license.

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[15] Justices Black, Douglas and Whittaker dissented from the overruling of **Wilcox**, and therefore voted for reversal of the conviction on other grounds. But assuming that **Wilcox** should be overruled they agreed with the "wisdom" of discharging the defendant rather than convicting him by declaring new, **ex post facto** doctrine. Justice Harlan, in an opinion joined by Justice Frankfurter, expressed the view that the question of wilfulness turned on whether **James** had actually relied on the **Wilcox** rule, and that that question should be decided by a jury rather than by the Court. Justice Clark voted to affirm, expressing the view that the evidence showed no reliance by the petitioner in **James** on the **Wilcox** opinion. Thus all the Justices agreed that one is not "wilful" if he follows what he is authoritatively told is the law.

It is certainly more reasonable to assume, in fact any lawyer will attest, that a businessman will read and rely on decisions of the Federal Trade Commission in determining how to advertise his products or services while one may well doubt that an embezzler will refer to decisions of this Court in deciding whether or not to report the proceeds of his crime on his income tax return.

That is why the question presented here is of sufficient importance to warrant review by this Court. It is a matter of common knowledge that businessmen *do* follow the decisions of the Federal Trade Commission, as they should, and they *do* conduct their affairs in accordance with those decisions. Lower courts and lawyers are reminded regularly that these administrative determinations must be accorded great weight. Thus, the question of whether adherence to the principles set forth in such decisions is or is not a defense to a mail fraud prosecution is a question which is of far reaching importance.

Moreover, if a businessman openly operates in accordance with an FTC decision served upon him by that agency and if he is told by that agency (through a charge) that he must comply with such decision, a serious constitutional question arises if he is nevertheless prosecuted under the Mail Fraud Statute for conducting such operations.

In that case, the statute would be unconstitutional because it would not be "sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952).

For this reason alone, the question of whether the Mail Fraud Statute was intended, or should be construed, to impose criminal penalties on persons who use the mail for purposes found by the Federal Trade Commission to be neither unfair nor deceptive is one which should be decided by this Court before the conviction of these petitioners becomes final.

2. The conviction of petitioners in this case is squarely in conflict with the principles established by this Court in *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902) reaffirmed in *Reilly v. Pinkus,* 338 U.S. 269 (1948) to the extent that:—a finding of wilfull fraud may not be based on charges concerning "medical practices in fields where knowledge has not yet been crystallized in the crucible of experience." 338 U.S. at p. 274. The *McAnnulty* case had held that neither "misrepresentation of fact" nor "wilfulness" can be established under the Mail Fraud Statute where the opinions of experts differ. In such a case there is "no exact standard of absolute truth by which to prove the assertion false and a fraud."

McAnnulty is indeed "a wholesome limitation upon findings of fraud under the mail statutes" *Reilly v. Pinkus, supra,* 338 U.S. at p. 274 when the doctors, nurses, educators, state legislators, and federal agencies have not been able to develop even a majority view, much less a consensus, in defining the functions of nurses, the training of nurses, the designation of nursing classifications, or the worth of the correspondence method with or without classroom work, to train persons for the performance of the simpler nursing tasks. At this point in history we are in a state of flux in this field—medically, professionally, and educationally.

As pointed out above, almost all the false representations alleged in the indictment are actually nothing more than statements of opinion. Petitioners were accused of stating that graduates of its school "would be highly trained and well qualified practical nurses," "would be eligible for hospital employment in the direct attendance and care of the sick," would be "qualified to give bedside care of the sick and carry out treatments under instructions of medical doctors," and "would be readily in demand for employment in a skilled capacity as a nurse at a greater pay rate than nurse's aide, and earning up to $12.00 per day." Petitioners were also accused of falsely claiming that they "maintain the highest of standards in facilities, staff, and personnel, and in the quality of instruction."

The Government's evidence to support the claimed falsity of these statements consisted entirely of the opinion evidence to the effect that practical nurses cannot be trained through a correspondence course, but only through actual clinical training, and that therefore a graduate of the Texas school or *any* correspondence school, for that matter, would be no better equipped for practical nursing than a person who had no training whatever.

As demonstrated, the trial court authorized the jury to resolve this conflict in opinion evidence and to convict independently of all other issues in the case, by accepting the Government's opinion evidence and not the defendants'. The likelihood that the jury did so convict is demonstrated (a) by the fact that the jury specifically inquired and was reinstructed by the Court that it could convict on some of the misrepresentations without believing in defendants' wilful guilt as to all of them; (b) by the

fact that it convicted defendants on account of the August, 1962, mailing, this date being three years after each and every matter complained of by the Government had been corrected; and (c) by the fact that the guilty verdict (which the Court set aside) also caught up a Registered Nurse in charge of the defendants' training who was not implicated in any way with the commercial or the advertising aspects of the School.

It is no answer for the Government to say that this case is *Leach v. Carlile*, 258 U.S. 138 (1922). That case involved representations far beyond a slight and incidental difference of medical opinion on a small point in the case. The representations there amounted to panacea-type claims for "Organo" tablets as reducing medicine. In this case, all that defendants said about their course, and especially the principal claim that graduates would be "highly trained and well qualified practical nurses" were fully supported by highly persuasive expert opinion and actual demonstrated proof. One of defendants' medical witnesses testified that his hospital had had occasion to use graduates of defendants' course, that they were competent and filled a need in his hospital, that having studied the course, he was of the opinion that it enables a graduate to engage in the work of practical nursing ("subject of course to the supervision of a doctor,") and that the course contains everything necessary for practical nursing work. (R. 932-36) Similar expert testimony was given by several registered nurses and this, in turn, was buttressed by the testimony of graduates who had in fact become employed by hospitals and by other agencies, including individuals, and enjoyed successful careers. There was not merely a "slight medical

conflict" as to one small feature of the case as in *Leach v. Carlile*. Defendants' evidence was in fact stronger than the Government's evidence and certainly represented a body of opinion and experience which justified defendants in believing in the value of their course and, conversely precluded a determination of wilful fraud.

3. Further, a vital statutory and constitutional problem arises in the attempt to apply *McAnnulty, Reilly v. Pinkus*, and *Leach v. Carlile* to a criminal case. All of these governing cases involved "fraud orders" under what is now 39 U.S.C. §4005 under which the Post Office, in effect, denies the use of the mails to those engaged in an alleged fraudulent scheme. This case involved a criminal statute, 18 U.S.C. §1341. Petitioners have not been merely denied the use of the mails. They have been convicted of a felony and have been severely sentenced and fined because of a jury's evaluation of expert medical testimony as to whether practical nursing can or cannot be taught by means of a correspondence course.

This Court has never faced the question of whether the principles of *McAnnulty* are applicable to a criminal fraud prosecution under 18 U.S.C. §1341, nor has this Court clarified how the resolution of fairly balanced but conflicting medical evidence is to be accommodated to the requirements of fair notice and due process in a felony prosecution. In this case, we may recite by rote that the conviction may stand because of *Leach v. Carlile*, but we do not know, even yet, in what respect one might say that these defendants made representations above and beyond those solidly based on credible medical opinion. Defendants represented, and their professional experts testified, that the correspondence course did produce

"highly trained and well qualified practical nurses." The Government answered through other professional experts that in their opinion the "practical nurse" does not exist any more. Those who perform the simpler tasks of nursing should be called auxiliary personnel. The term "practical nurse" should be applied only to "Licensed Practical Nurses" or "Licensed Vocational Nurses." When the terms are so re-defined, practical nursing cannot be taught by a correspondence course. Therefore, the defendants' claims were "excessive" and *Leach v. Carlile* applies.

To ensnarl persons in criminal prosecution for the purpose of resolving these unpredictable and delicate differences in medical and educational opinion is, to say the least, unfair. But, for the lack of authoritative pronouncement by this Court, the Government was able to argue below that the *McAnnulty* rule and the cases applying it on which defendants relied, are grounded on constitutional restrictions or prior restraints of communication and hence are less applicable to a criminal conviction under 18 U.S.C. §1341. It argued on the basis of *Near v. Minnesota*, 283 U.S. 697 (1931), and the dissenting opinion of Mr. Justice Holmes in *Leach v. Carlile*, *supra*, that the rule against prior restraint of communication is the basis of the *McAnnulty* doctrine and that if one abuses his freedom of speech he may then be brought before the bar of a criminal court. Therefore, "None of these factors [related to prior restraint] has any bearing on a criminal fraud prosecution, with the full panoply of common law procedural rights and protections, such as the case at bar.[16]

[16] Government Brief, p. 18.

We believe, to the contrary, that although the language of 18 U.S.C. §1341 is similar to the postal regulation contained in 39 U.S.C. 4001, the Constitution requires that it should be construed much more strictly. The constitutional reason is not that which was adverted to in the dissent of Justice Holmes to *Leach v. Carlile*, 258 U.S. at 140-41, as to the propriety of a prior restraint on communication. Rather, the requirement is that of the due process clause that the Mail Fraud Statute, a criminal statute, give clear notice of the conduct prohibited. "It is well established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process." *Wright v. Georgia*, 373 U.S. 284, 293, (1963) and cases there cited. This principle is clearly applicable when there are, as here, free speech considerations. See *Cox v. Louisiana*, 379 U.S. 559, 574 (1965). But they are also applicable to ordinary business transactions. See *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

Recently, this Court, in *United States v. National Dairy Corp.*, 372 U.S. 29, (1963) sustained the constitutionality of Section 3 of the Robinson-Patman Act against an attack based on vagueness. The distinction which the Court there made between Section 3 of the Robinson-Patman Act and the standard held too vague in *Cohen* is enlightening here. "The standard held too vague in *Cohen*," the Court said, "was without a meaningful referrent in business practice or usage. 'There was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute. . . .'" 372 U.S. at 36.

The record here is proof of that. We repeat again the comment of the Dean of the University of California School of Nursing: "There are widely differing concepts among nurses themselves, among physicians, hospital administrators, and the public about the functions of nurses and about how nurses should be prepared for these functions." Nahm, *Nursing Dimensions & Realities*, 65 American Journal of Nursing No. 6 (June, 1965) p. 96.

Here there clearly is no meaningful referrent in business practice or usage, nor any accepted and fairly stable commercial standard. If a conviction of mail fraud can be had whenever the Government is able to present opinion testimony that the products or services offered by a businessman are not as good as they are advertised to be, very few businessmen indeed would be immune from prosecution. More importantly, no businessman would be able to determine with any degree of certainty whether he was complying with the law or not. Surely the due process clause requires criminal statutes to be more clear and definite than that.[17]

4. This is another case in which a federal statute, this time the Mail Fraud Statute, is used to pursue a supposed state policy which ought to be left to the State to define and implement. If the sale of a correspondence course in

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[17] Recently, this Court upheld the power of the S.E.C. to regulate the content of commercial literature by requiring that additional affirmative disclosures be made in it. This injunctive order, operating prospectively, was called a "mild prophylactic" by this Court. At the same time, this Court recognized that different questions might apply if the case were a criminal proceeding for "wilfully" violating the same statute by failing to make the affirmative disclosures in question. **S.E.C. v. Capital Gains Research Bureau, Inc.**, 375 U.S. 180 (1964) at p. 192, ftn. 40.

practical nursing is fraud because of state laws which regulate the practice and teaching of nursing, state criminal (or other) statutes should be invoked.

In *Rutkin v. United States*, 343 U.S. 130 (1952), a case where the income tax laws were used to incarcerate one who embezzled under state law, four dissenting justices spelled out some consequences to both federal and state government where the former unnecessarily assumes the latter's burdens. State government and officials so relieved of responsibility, soon feel free ". . . to surrender [to the federal government] control of the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws . . . state prosecutors are deprived of the all-important function of deciding what local offenders should be prosecuted." 343 U.S. at p. 142-43.

These truisms have been recognized by the full Court. In *Parr v. United States*, 363 U.S. 370 (1960) this Court held that the Mail Fraud Statute could not be used to enforce state policies, no matter how laudable, against misappropriation, conversion, embezzlement, or theft.

To compound the mischief, the Mail Fraud Statute has been used here to create a state policy which does not exist or at least to "stretch" a state policy further than the state legislature was willing to go.

Texas has provided for the creation of schools to train Licensed Vocational Nurses and has also established the public designation of these nurses by certain words of art—"L.V.N." or "Licensed Vocational Nurses." However, the Texas legislature recognized the acute shortage of nurses and the vast need for nursing services which existed at the

time of enactment in 1951 and which was bound to exist for many years into the future. The statute, Vernon's Annotated Civil Statutes, Article 5528c, provided in 1951, and still provides, that

> ". . . the provisions of this Act shall not apply to . . . persons who do not hold themselves out to public as being Licensed Vocational Nurses or using the abbreviation L.V.N." (See Appendix, pp. 12-13, *infra*).

Accordingly, the Government's expert witness, Mrs. Janie Rountree Gibson, Director of Training for the Texas Board of Vocational Nurse Examiners, was forced to admit on defendants' cross examination that there are literally scores of thousands of practical nurses at work in Texas and the state authorities recognize fully their right to nurse for hire. (R. 439) The Legislature could hardly do otherwise. As late as 1962, only 24,000 L.V.N.'s had been trained and 166,000 vacancies existed in Texas hospitals alone for which licensed personnel were not available. (R. 428-30)

No doubt, the Texas legislature drew the line as it did, because — as the FTC put it — "For practical reasons, it is better to have the best result possible than to require the best possible result." 54 FTC 1764. The Texas legislature did not provide for the creation or accreditation of any kind of school, correspondence or otherwise, for practical nurses or unlicensed personnel. It elected to leave this field to play of natural forces. (R. 436-37)

Therefore, this state official, Mrs. Gibson, was entirely without warrant of authority from the State when she testified as a Government witness that the terms "practical nurse" and "vocational nurse" are the same. (R. 409)

Nor did she reflect state policy when she joined with the executive heads of the local medical association and the Texas registered nurses association, to testify that practical nursing cannot be learned by correspondence courses because "nursing is a profession" which must be learned by "guided experience" in order to have a "safe, competent bedside nurse." (R. 404-05)

It was necessary, of course, for the Government to redefine the words "practical nurse" in order to support its claim of incompetence and misrepresentation. Among other absurdities it offered in evidence an opinion of the Texas Attorney General on the subject of reciprocity in licensure. (Gov't Ex. 44; R. 89-92) Since the opinion upheld reciprocity for LPN's (Licensed Practical Nurses) from other states to become L. V. N.'s in Texas, vocational nurses and practical nurses are the same by definition, it argued.

What has been done here is to improvise a new policy for Texas. The Texas legislature created and specially designated the "L.V.N.", It left unregulated the teaching and designation of unlicensed nursing personnel. This prosecution, however, reflects dissatisfaction with Texas' policy. The Texas legislative standard is too lax; the Texas designation system for nurses is not clear enough.

Not the least of the pitfalls in furthering state policy by federal criminal prosecution is the uncertainty of divining the exact state law upon which the federal cases should be built. Prophetically, Justice Black's footnote 5 in the dissent in *Rutkin v. U.S.*, 343 U.S. at p. 144, remarks:

> "Enforcement of all or some of these [state] rules in federal courts injects an element of uncertainty into criminal trials. Questions arise as to how much law of what state applies. Then the federal court must attempt to decide what the state law actually is and how it applies to the particular conduct alleged to be criminal. . . ."

Regardless of the good motives of the postal inspectors and of the state employees who have joined together to mount this prosecution, the fact remains that they have accomplished together what neither could do alone. There is no state policy to support the standards and designations in the field of nursing which the prosecution here demands. By attaching "mail fraud" to a rudimentary state law, they have hammered out a new policy. In a sense, the result is another recurrence of the old "silver platter" practices of state and federal officers in search and seizure cases and in self-incrimination cases. What neither was permitted to do alone, could still be done—if they worked together. *Mapp v. Ohio,* 367 U.S. 643 (1961); *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964).

5. Faced with an indictment awkwardly constructed on state law, defendants rightly challenged it. This federal indictment represents a reading of state law and policy through rose colored glasses.

In the first place, the allegation of wilful concealment by failing to advise prospective students that "they would not be eligible for employment as vocational nurses in the States of Texas and California and would not be eligible for employment as practical nurses in other states of the United States" is completely false as was easily demonstrated

above by reference to the FTC decision in the *Schulze* case, *supra*. To convict defendants for this wilful omission is to require them to misconstrue state law. In the alternative, it is to require defendants to accept the re-definition of terms which the Government desires. What is worse, it requires defendants to foresee and know about such proposed re-definition of terms.

In the second place, the criminal omission of failing to tell students that the School "was not an accredited educational institution" is literally an omission in a void, if such a thing can be visualized. It was stipulated in this case that no accreditation, public or private, is available for schools teaching practical nursing, and this applies to correspondence schools or any other kind of schools, for that matter. This is so because Texas created only a limited type of training program, that is, a training program for L.V.N.'s, that is, persons of tenth grade education who could attend a one-year program of work and study leading to licensure. The complained of omission is something that would not occur to one in advance as something which would constitute a misrepresentation by omission. The charge could be thought of only by one steeped in the thinking only schools which lead to licensure should be permitted.

Texas, however, did not legislate in those terms and did not provide for the regulation, designation, or comparison of unlicensed practical nursing to the L. V. N. It is not due process, and it is not good government, to alter and expand Texas state policy by attaching to it the rules of criminal mail fraud.

It must be remembered that defendants did not "conceal" some action on their part, or some fact known only to them. What defendants did was to fail to make an af-

firmative exposition of law and fact known to the public at large. This, then, is a true case of criminal conduct by omission and defendants may not be convicted unless it can be said that they knew of their legal obligation to perform the affirmative act and intentionally failed to abide by that known obligation.

It is submitted that the very nature of these non-disclosures is such that the law may not demand that the defendants know in advance that it would be criminal failure to act. *Lambert v. California*, 355 U.S. 225 (1958); *Bullitt v. Baggett*, 377 U.S. 360 (1964), and cases there cited. This is "knowing but guiltless behavior."

The indictment was also challenged for the vagueness resulting from the adoption of the controversial lingo and conceptions of the opponents of unlicensed nursing. For example, as to the principal charge that it was false and fraudulent to represent the School's graduates as "highly trained and well qualified practical nurses" not only is this a matter of medical, educational, or commercial opinion and conclusion, but also if the phrase "practical nurse" is used in some special sense other than its ordinary meaning, defendants were not sufficiently apprised. The same would apply to the claim that it was false and fraudulent to say that graduates would be "eligible for hospital employment in the direct attendance and care of the sick." No state law forbids such employment. If the word "eligible" is used in a sense of legal liability it is erroneous. If used in some other special sense, defendants were insufficiently apprised of the nature of the charge. The phrase "in the direct attendance and care of the sick" is so vague and indefinite as to fail to apprise the defendants of the nature of the charge against them. (See defendants' Motion in Arrest of Judgment, R. 1544-53)

It is apparent that the controversy at the bottom of this case is one of conflicting medical and professional opinion as well as one of differences in proper legislative policy. The entire debate belongs in the professional societies, in the public arena, in state legislative bodies, and in properly equipped administrative bodies which can give intelligent, accurate guidance and regulation mainly by the tried and tested injunctive directives. The controversy and its solution cannot be pounded into the mold of a mail fraud criminal prosecution without much violence to petitioners' rights and harm to the country.

There was never a question of a need in this case to eliminate the Texas school. By the operation of natural economic forces its enrollment had declined to 53 students in 1963, according to the testimony of petitioner Adams. Unlicensed practical nursing will inevitably decline as we find ways to produce highly trained nurses in proper numbers. This is all the more reason why this prosecution is not right.

CONCLUSION

For the reasons set forth hereinabove, this petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
Southern District Of Texas
Houston Division

November 19, 1962

Memorandum:

This case grows out of a nineteen-count indictment charging violations of the mail fraud statute, 18 U.S.C.A. 1341. The defendants have now made three motions: (1) for a Bill of Particulars; (2) To Dismiss the Indictment or to Strike Clauses or Counts; (3) To Require the Government to Designate Collateral Transactions. For the reasons set out below all three motions will be denied.

The essence of the scheme as alleged is eight misrepresentations, set out in the first paragraph of Count One, and the nondisclosure of three material facts, set out in paragraph 2 of Count Seven. The motion for bill of particulars asks that the government reveal (a) whether each misrepresentation was oral or written; (b) who made each misrepresentation and/or nondisclosure and to whom. The defendants claim, on the basis of an affidavit by Warren J. Adams, Director of the Texas School of Practical Nursing, that the school's business is so substantial and its records so voluminous that they will not be able to prepare their defense without the requested information. In passing on a request for a bill of particulars the court must balance the needs of the defendant against the government's right not to disclose its witnesses, evidence or legal theories.[1] In striking the appropriate balance in the case at bar the following factors are important: the indictment is full and complete

[1] See, e.g., U. S. v. Casserino, 189 Fed. Supp. 288; Johnson v. U. S., 207 Fed. (2d) 314.

and there is no question as to the nature of the offense charged; it sets out all the misrepresentations and nondisclosures on which the government relies; it gives the names of nine of the school's former students to whom the misrepresentations and/or nondisclosures were made, which should assist the defendants in segregating the information in their files pertinent to their defense; the information requested is or should be in the possession of the defendants.[2] In light of all these factors this court does not feel that it would be a proper exercise of its discretion to allow the motion for bill of particulars.[3] The foregoing discussion also supplies the reasons for the denial of the motion for designation of collateral transactions.

As to the motion to dismiss or strike, the cases show (a) that the fact that the government's position can only be sustained by expert testimony is not a fatal defect,[4] and (b) that nondisclosure cannot as a matter of law be said to fall outside the scope of mail fraud.[5]

The clerk will notify counsel to draft and submit orders accordingly.

JOE INGRAHAM

United States District Judge

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[2] Himmelfarb v. U.S., 175 Fed. (2d) 924; 4 Barron & Holtzoff, Sec. 1917.

[3] The defendant relies principally on U.S. v. Greve, 12 Fed. Supp. 372, but in that case the request did not have the effect of forcing the government to reveal its witnesses or theory. In other complicated cases bills of particulars have been refused. See U.S. v. Ford Motor Co., 24 F.R.D. 65.

[4] Reilly v. Pinkus, 338 U.S. 269.

[5] Cacy v. U.S., 298 Fed. (2d) 227.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Before HUTCHESON and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

HUTCHESON, Circuit Judge: Convicted and sentenced after jury trial in the United States District Court for the Southern District of Texas, on charges of mail fraud and of conspiracy to violate the mail fraud statutes, defendants have appealed. Their respective sentences were: the incorporated school was fined $13,600; Miller, its president, was sentenced to eighteen months to be served, to five years suspended, and was fined $10,800; while Adams, its director, was sentenced to nine months to be served, to five years suspended, and was fined $5400.

The appellant school was, and held itself out to be, primarily a correspondence school for practical nurses, but it also offered an optional training period at its offices. The term "practical nurse" has no statutorily defined meaning or recognition in Texas and no state license as such is granted or authorized. The State does recognize, license, and regulate Registered Nurses (R.N.) and Licensed Vocational Nurses (L.V.N.). A practical nurse, less skilled than either of these, is apparently more on the order of a nurse's aide, performing such duties as making beds, bathing patients, giving some types of shots, etc. The school was a private profit-making venture, not a part of any hospital or clinic. The highest professional qualification among its full-time employees was that of registered nurse. Those

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*Of the District of Oregon, sitting by designation.

students who attended the optional training at the offices heard guest lectures by visiting doctors on occasion, but they were not given any actual supervised experience with live patients during their training. There is no accreditation available for such a school, but the school awarded a diploma certifying the recipient as a "Graduate Practical Nurse," and apparently all students passed the course and received the diploma.

Expert testimony as to the value of the course was conflicting. Some doctors and nurses testified that it provided all that a practical nurse needed to know, while others said that the graduates of such a course would not be given any more consideration by a prospective employer than would someone who had not taken it. Graduation from appellant school did not qualify the graduate to take any licensing examination or receive any certificate given by the State. It seems that most hospitals will not hire unlicensed nurses. These graduates probably could obtain employment as nurse's aides or orderlies, but it is not shown that their training or diploma had any effect in making this easier to do.

There is evidence that some of the appellant school's salesmen represented that the graduates would be issued a license, although the printed material makes no mention of a license. Appellant's usual reply to license inquiries seems to be that practical nurses are not required to have a license in Texas, which is true. However, the types of nurses which seem likely to get jobs as nurses, namely Registered Nurses and Vocational Nurses, do have to be licensed.

The Government's attack was, and is, primarily a contention that appellants fraudulently held out that grad-

uates of their course would be highly trained and well qualified practical nurses, with unlimited employment opportunities at greater pay rates than nurse's aides, while in fact the correspondence school offered only limited training with no practical experience, producing practical nurses whose qualifications suited them, at best, for serving as nurse's aides and who were not qualified for any type of license or certificate, and consequently could not work in most hospitals as nurses.

Appellants assert seven errors, to-wit:

(1) Appellants urge that the indictment as a whole, as well as certain specific charges of misrepresentation, should have been dismissed because they concern matters merely of medical opinion. For this view they rely primarily upon *American School of Magnetic Healing v. McAnnulty,* 187 U.S. 94 (1902), holding in effect that in an area of conflicting medical opinion, a mail fraud conviction may not rest upon the opinion of one set of medical experts when there are contradictory expert opinions. They assert that neither "misrepresentation of fact" nor "wilfullness" can be established under the mail fraud statutes where expert opinions differ. They also assert that the indictment is not sufficiently specific to give notice of the crimes charged and that some of the nondisclosures charged are not criminal.

(2) Appellants also assert that the evidence is insufficient to support the alleged misrepresentations and concealment of facts. (As to concealment, the Government's main argument is that appellants should have fully advised the applicants that they would not be eligible for a nurse's license following the course instead of, as they did by silence on the matter, including the belief that they would be).

The Government, answering points (1) and (2), asserts that the indictment was sufficient in law, that it sufficiently alleged the crime involved, and that it was supported by sufficient evidence to support the jury verdict of guilty.

(3) Appellants, relying on the *McAnnulty* case, *supra*, urge that the court erred in authorizing the jury to convict on conflicting expert opinion as to the value of its course and the competence of its graduates.

The Government, countering *McAnnulty* with *Leach v. Carlile*, 258 U.S. 138 (1922), insists that the case did not turn on the adoption of one school of conflicting medical opinion as against another, but that the fraud charges were that the representations and concealments as to what the course was, did not fairly and truthfully advise as to what it in fact was, and that such representations and failures to inform of the true facts were wilfully and knowingly made to deceive and for gain; that if the course was of some slight value, it was not as represented. The Government relies primarily upon *Leach v. Carlile*, *supra*, for the proposition that even if the course had some value, it was a fraud on the public to represent, as appellants clearly did, that the school turned out highly trained and qualified Graduate Practical Nurses.

(4) Appellants complain of the refusal of the Court to order production of Jencks Act statements of a postal inspector, whom appellant called to testify, on the theory that the Government's cross-examination went beyond the scope of the direct examination and thereby made the inspector the Government's witness and subjected his statement to the Jencks Act.

The Government contends that the Act requires production only when the witness was *called* by the Government, and that, in any event, it did not go beyond the scope of appellants' direct examination. Appellants also complain of the delay, until late in the trial, of the production of another statement ordered produced by the court and of the fact that two such statements were not produced until after the trial. The Government says it could not find the statements and that they were not in the possession of the United States attorneys who complied as best they could, and that, in any event, the appellants were not prejudiced by the delay on the one produced late because the jury found it not guilty on the count to which the statement pertained. As to the two that were not produced until after trial, the Government argues that they are consistent with the testimony given by the witnesses who gave the statements, so no prejudice resulted by failing to produce them.

(5) Appellants insist that the court erred in excluding two exhibits which consisted of employment applications filled out by the school's salesmen which were offered to show that appellant school thought it had hired high class salesmen, though it is now alleged that they had made fraudulent representations. The Government argues the applications are hearsay and not germane to the real issue, which is what the salesmen represented to the students, and that they were therefore properly excluded.

(6) Appellant asserts that the only damaging evidence as to representations about licensing by its salesmen came from surprise witnesses not named in the indictment, and that it had no opportunity to investigate these transactions to prepare its defense as to them.

The Government replies that these witnesses were called to show the general scheme with which appellant was charged and as to which it had notice, and that the Government is not obliged to disclose its witnesses in advance of trial, absent a statute or rule so requiring.

(7) Appellants argue that they were prejudiced by the Government's arguments which described the United States attorneys as public servants and the defense counsel's opinions as "opinions bought and paid for".

The Government asserts that no objection was made below on this point and that the comments were merely the results of the heat of the trial, stirred in part by defense counsel comments; that they were, therefore, not improper and, if they were error, they were not prejudicial but harmless error.

We are of the clear opinion: that the indictment was adequate and legally sufficient; that there was sufficient evidence to support the jury verdict; that none of the assignments and complaints constitute reversible error; and that the judgment should, therefore, be and it is hereby

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21217

D. C. Docket No. Cr. No. 14413

WARREN J. ADAMS, DAVID SIDNEY MILLER and TEXAS SCHOOL OF PRACTICAL NURSING, INC.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before HUTCHESON and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

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*Of the District of Oregon, sitting by designation.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Warren J. Adams, David Sidney Miller and Texas School of Practical Nursing, Inc., be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

June 18, 1965

Issued as Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21217

WARREN J. ADAMS, DAVID SIDNEY MILLER and TEXAS SCHOOL OF PRACTICAL NURSING, INC.,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Texas

(August 6, 1965)
On Petition for Rehearing

Before HUTCHESON and GEWIN, Circuit Judges, and KILKENNY,* District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

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* Of the District of Oregon, sitting by designation.

VERNON'S TEXAS CIVIL STATUTES,
Vol. 13, Art. 4528c

Art. 4528. Licensed vocational nurses

Definitions

Section 1. (a) The term "Licensed Vocational Nurse" as used in this Act, shall mean any person who directly attends or cares for the sick for compensation or hire, and whose personal qualifications, preliminary education or nursing education in biological, physical and social sciences will not qualify that person to become certified as a professional registered nurse, as defined and regulated under the laws of this State, and who uses the designation Licensed Vocational Nurse, or the abbreviation L. V. N.

(b) The term "Board" as used in this Act, shall mean the Board of Vocational Nurse Examiners as provided for hereafter in this Act.

Prohibiting Practice Without a License

Sec. 2. After the effective date of this Act, no person except those herein after expressly exempted, shall use the designation as a Licensed Vocational Nurse or the abbreviation L. V. N., unless such person shall hold a duly issued license as such, issued by the Board pursuant to the provisions of this Act.

Exceptions

Sec. 3. The provisions of this Act shall not apply to gratuitous nursing of the sick by friends or members of the family; nor shall the provisions of this Act apply to persons licensed by the Board of Nurse Examiners; nor

shall the provisions of this Act apply to those persons who have graduated or may hereinafter graduate from the State Tuberculosis Sanatorium School of Nurses, so long as such persons nurse only tubercular patients; nor to persons employed by hospitals as maids, porters or orderlies; nor shall the provisions of this Act apply to persons who do not hold themselves out to the public as being Licensed Vocational Nurses or using the abbreviation L. V. N.

* * *

Federal Trade Commissions Act, 15 U.S.C.A. §55 (a)

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

MAIL FRAUD — 13 U.S.C. #1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent presenses, representions, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 139, § 34, 63 Stat. 94.

STATEMENT OF CHARGES

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended 52 Stat. 111; 15 U.S.C.A., Sec. 41), an investigation was made of the acts and practices used by Texas School of Practical Nursing, Inc., a corporation, and David S. Miller and Anna L. Miller, individually and as officers of said corporation, in commerce, as defined by the Act. On the basis of the facts developed by such investigation it appears that the aforesaid

individuals have been or are using in commerce certain acts and practices which are violative of the provisions of said Act with respect to the advertising and sale of a course of instruction in practical nursing, and that the said individuals should be required forthwith to cease and desist from representing directly or by implication, that persons completing the course of instruction of the Texas School of Practical Nursing, Inc. are eligible for employment or will be employed as practical nurses by hospitals or institutions unless it is clearly revealed that such persons will not be eligible for employment and will not be employed as practical nurses in the States of Arkansas, Idaho, Louisiana, Nevada or New York, or in hospitals in the State of Rhode Island, or in any other State that may now have, or may hereafter enact, a law making it mandatory for practical nurses to be licensed.

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702-810—65

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 646

WARREN J. ADAMS, AND TEXAS SCHOOL OF PRACTICAL NURSING, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-8) is reported at 347 F. 2d 665.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1965. A petition for rehearing was denied on August 6, 1965. On August 27, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to October 5, 1965, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Mail Fraud Statute, 18 U.S.C. 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

QUESTION PRESENTED

Whether there was sufficient evidence to support the jury's verdict.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on October 31, 1963 of seventeen counts of an eighteen count indictment charging sub-

stantive violations of the mail fraud statute (18 U.S.C. 1341). Petitioner Adams and his co-defendant, David Sidney Miller, were also convicted of conspiring to violate the mail fraud statute, in violation of 18 U.S.C. 371.[1] The corporate petitioner was fined $13,600. David Miller was fined $10,800, and sentenced to imprisonment for eighteen months on each of the first nine counts, to run concurrently; on the remaining counts, he received a five-year suspended sentence (R. 1446–1447).[2] Adams was fined $5,400 and sentenced to imprisonment for nine months on each of the nine counts, to run concurrently, and received a five-year suspended sentence on the remaining counts (R. 1447).

1. Miller was the president and Adams the director of the Texas School of Practical Nursing, a profit-making corporation ostensibly engaged in the training of unlicensed "practical nurses", also known as nurses' aides (R. 1192).[3] Petitioners offered a cor-

[1] A fourth defendant, Miss Lola Opal Christal, was also convicted by the jury of the above charges; however, the district court granted her motion for a judgment of acquittal (R. 1414).

[2] "R." designates the five bound volumes on file with the clerk of the court, containing the transcript of record of trial and sentence, pleadings, and various exhibits. The exhibits appear in a separate bound volume.

[3] The duties of a nurses' aide involve the performance of menial chores, such as bedmaking or taking of temperatures, usually at hospitals or nursing homes (R. 341, 815). Only six (the so-called "mandatory") States require that nurses' aides be licensed. The "permissive" States, including Texas, allow unlicensed nurses' aides to work so long as they do not represent in any way that they have a State license (Gov't Exh. 44, R. 399–403).

respondence course for $153.50. For an additional sum of $62.50 (less a travel rebate) the student could participate in a two-week supplemental course at the school in Dallas (R. 990).

Petitioners' method of operation was to publish classified newspaper advertisements, inviting inquiries by mail (R. 13, 45, 51, 58, 73, 94, 156, 184). The advertisement was headed "Nurses Needed" and the text stated that the school offered full- or part-time training as practical nurses. It was stated that a high school education was not necessary. The advertisement implied that a graduate of the school would receive "[h]igh earnings." (See Gov't Exh. 18a.)

Inquiries were answered by a letter enclosing information pamphlets (R. 13, 95, 215, Gov't Exhs. 1, 1A, 7, 7A), advising the inquirer of the demand for nurses, the benefits to be received from the completion of petitioners' course, the availability of a free employment service, and the forthcoming visit of a "Student Counsellor." The prospect was told that upon completion of the course she would receive a diploma designating her as a "Graduate Practical Nurse (Gov't Exhs. 1, 7).

The "Student Counsellor" who contacted the prospective student was nothing more than a commission salesman (R. 673–684). He had no training in practical nursing (R. 1128). He received a $30 to $40 commission for each course sold (R. 680, 682). If sales were slow, he might receive a letter from Adams urging greater "production" (R. 1110–1111, Gov't Exh. 51).

The salesmen left the impression with many students that graduation from the school meant that a person was a licensed nurse or could take the State examination to become one (R. 16, 27, 87, 156, 186, 248, 268, 1163, Gov't Exhs. 6B, 6E, 27, Def. Exh. 63). Some salesmen neglected to discuss licensing at all (R. 98, 216). Students were also told that they would receive hospital training (R. 52, 54, 75, 99–100, 145, 268) and that after graduation they could get a job in any hospital (R. 25, 31, 52, 145, 248) and earn from $8 to $14 a day (R. 16, 74, 87, 98, 113, 239). Another enticement was the offer of a free employment service, which guaranteed the graduate a job (R. 58, 74, 75, 82, 158).

Once the student embarked upon her studies, she had no supervision. Her "examinations" were not proctored. On the rare occasion when she did poorly, her test paper would be returned with the right answers underlined in red (Gov't Exhs. 32, 32A). She would be advised to re-study her lesson and submit a second copy of the same test paper (R. 248–249). The school had no educational qualifications for enrollment (Gov't. Exh. 18A).

James A. White was hired by the school in January 1957 to serve as the "student adviser" (R. 494). This title meant only that his job was to answer all routine correspondence (Gov't Exhs. 6C, 10, 17H, 21, 22, 32F, 53). Adams composed a book of form letters upon which White was to base his replies (R. 498). Two of the forms dealt with licensing; one, for correspondents in Texas; the other, for all other

correspondents (R. 499). Adams ordered White not to deviate from the forms (R. 504). White answered 25 to 40 letters per day, most of them complaints (R. 502). If a complaint was received from a student residing in a State which required all practical nurses to be licensed, White was instructed to be evasive in his reply (R. 562).

Letters of complaint were answered by adapting paragraphs of one or more form letters to fit the circumstances (R. 504). If White could not provide an answer from the form letters, he turned the complaint over to Adams (R. 504). If a complaint charged misrepresentations by a salesman, White was instructed to inform the student that the salesman had been in the school's employ for many years and that the school had not received previous complaints against him (R. 506). If this reply was not true, and often it was not, White passed the letter on to Adams (R. 506). Demands for refunds were paid only after exhaustive dilatory correspondence failed to dissuade the students (R. 507–509). White terminated his employment in November 1962 (R. 494).

The course of study and the benefits obtainable from petitioners' school were not as represented to the students. The Texas School of Practical Nursing occupied the second story of a building in Dallas. The first floor was occupied by an optical company, which had an outdoor sign. This sign was deleted from the picture of the building which petitioners used on some of their stationery (R. 500), giving the reader the impression that the school occupied

the entire building. The school employed some registered nurses as teachers. Its faculty list also included the names of two medical doctors who lectured there on rare occasion but who had never consented to be, or knew that they were, represented by petitioners as being members of the faculty (R. 501, 333–335, 447). All correspondents who paid their fees in full passed the course (R. 733, 958) and were granted a diploma (Gov't Exh. 14C). Students who elected to come to Dallas for the advertised two-week "hospital" course spent that time at the school practicing on dummy patients or viewing movies or lectures by milk salesmen (R. 76, 523, 820). In addition, they were treated to a tour of the Dallas Health Museum, a free public building (R. 895, 911–912). They received no training in hospitals (R. 75, 1164). Petitioners' school was never accredited, and was ineligible for accreditation (R. 345–347, 408, Gov't Exh. 49). The advertised "free employment service" consisted of a form letter issued to the student who passed the course, praising her as industrious, dependable and conscientious, and setting forth her "scholastic average" (Gov't Exhs. 12, 14B). Listed on the back of the letter were a number of hospitals or nursing homes, which she was advised to contact. Students who sought employment at any of these places were usually rejected (R. 60, 80; Def. Exh. 63). Concerned about the sham employment service, White suggested to Adams and Miller that they create a special department whose sole duties would involve the placement of students. Miller and Adams re-

jected the idea, saying that "the school was not in the employment business, had no intentions of getting in it, and that the problems of graduates were no concern of theirs." (R. 523–524.) When students who attended the two-week course at the school inquired about prior representations made to them that graduation would entitle them to a license, Adams replied that they must first go to Austin to appear before a board, but that the correspondence course would make them eligible to obtain the license (R. 78, 110, 1156). One nurse who had taught at the school in 1956, 1957, and 1962 estimated that in an average class of from seventeen to twenty students, three or four complained of prior misrepresentations made regarding eligibility to obtain a license as a result of their studies at petitioners' school (R. 1156, 1157).

The experiences of Mrs. Hayden Goss, Mrs. Helen Buchta, and Mrs. Lulu May Robertson with petitioners' correspondence course were typical. Mrs. Goss, a waitress, responded by mail to petitioners' classified advertisement, and on January 14, 1958, was sent petitioners' paraphernalia (Gov't Exhs. 1, 1A). A salesman then called on her. He represented that if she took the course she would become a licensed practical nurse and earn as much as $14 per day (R. 16). The salesman asserted that the "license" was recognized in Texas and Canada (R. 17). In fact, the State of Texas licenses only registered nurses and vocational nurses, and never certified the Texas School of Practical Nursing as qualified to license nurses (R. 408), because, among other reasons, the school

provided no training with live patients and the educational level of its students was generally inadequate (R. 406, 435). Mrs. Goss commenced the correspondence course, and, despite a seventh-grade education, was able to pass her home study examinations with marks of 95 to 100 (R. 20). Prior to completing the entire course, Mrs. Goss discovered that the diploma she would receive from the petitioners was not recognized by the State (R. 36). She decided not to continue the course, and received letters from petitioner regarding her credit rating (Gov't Exhs. 2, 3, 4, 5).

The salesman sent to follow up the inquiry of Mrs. Helen Buchta, who had a fifth-grade education (R. 220), advised her that upon completion of the correspondence course she could work in any hospital in Texas (R. 216). Her letter to the school inquiring about licensing was never answered. She finished the course with average grades above 95 and received a diploma signed by petitioner Adams and Doctor David Miller (Gov't Exh. 9C).[4] Her applications for employment in hospitals were rejected (R. 220, 233).

Louisiana is one of a half-dozen States which require a license for practical nurses. Mrs. Lula May Robertson, a house maid who resided in Louisiana, was told by a school salesman that the Texas School was accredited (R. 238, 241) and that she would be able to work in Louisiana after completing the cor-

[4] In June 1957, the Rutherford Metropolitan Technical Institute of Business, Dallas, Texas, had awarded Miller an honorary doctor of business administration degree (R. 390). The award was the idea of an advertising company which handled the Texas School of Practical Nursing's account (R. 391).

respondence course (R. 238). Despite a fifth-grade education, she received a grade of 97 on her final examination, and her overall average was 92 (R. 240; Gov't Exh. 25). After "graduating", Mrs. Robertson was still not qualified under Louisiana law to obtain a practical nurse's license. She wrote one letter to petitioners, inquiring about licensing, and received no reply (R. 240). At the time of trial, Mrs. Robertson was still working as a house maid, earning $5 per day (R. 239).

2. At trial, Adams denied any intent to deceive (R. 1043, 1123). He asserted that salesmen were often warned about misrepresenting the course (R. 1043–1044) and that some were discharged if they continued to do so. He described the willingness of the school to cooperate with a Post Office and a Federal Trade Commission investigation (R. 1050–1052, 1105–1107). He admitted ordering White to use a form-letter reply to inquiries concerning State licenses (*e.g.*, Gov't Exhs. 27, 28), but felt that the forms adequately answered the complaints (R. 1123). Although Adams was the school director and worked at the Dallas location, he denied any knowledge of the many dissatisfied students (R. 1056).

ARGUMENT

Although phrased in different ways, the entire thrust of the petition for certiorari is to contest the sufficiency of the evidence to sustain petitioners' convictions. This is not a question warranting further review.

1. The evidence showed that petitioners preyed upon the uneducated by luring them with promises of professional status and well paying jobs upon completion of a correspondence course in practical nursing (Gov't Exh. 18A). The first literature received by the unsuspecting prospect included a touched-up picture of the school building in Dallas and represented that the graduate would be qualified in a highly respected occupational specialty recognized by hospitals and other potential employers (Gov't Exhs. 7A, 17A). Those who completed the course were described as "Graduate Practical Nurses." In fact, the title is without significance in the nursing profession (R. 338–342, Gov't Exh. 44). Petitioners' school is unaccredited and wholly ineligible for any form of accreditation (R. 408, 436; Gov't Exh. 49).

Misrepresentations and half-truths were central to petitioners' scheme. The record contains many examples of prospective students inquiring about whether they would be eligible for a State license upon taking petitioners' course and of salesmen misrepresenting that students would be eligible. If the question did not arise until after the student had begun her studies, the school replied, if at all, by a form letter. The letter did not contain a direct and clear "No." Nor did it explain the State requirements for obtaining a license. Instead, it ambiguously advised that a license was not necessary for a practical nurse (Gov't. Exh. 17D, R. 499, 511–512, 1122–1123). See *Beasley* v. *United States*, 327 F. 2d 566 (C.A. 10), certiorari denied, 377 U.S. 944. The

ambiguity was intentional (R. 504). Misrepresentations were also made that the employment service would obtain a job for the graduates, that hospital training would be provided, and that the graduates would be in great demand as highly trained and well qualified nurses eligible for work in hospitals. Furthermore, a recitation that petitioners' school had a national affiliation was continued long after the national organization of schools of practical nursing was disbanded (R. 305–306). On this evidence the jury had the right to conclude that petitioners were knowingly engaged in a scheme to defraud. See *Babson* v. *United States*, 330 F. 2d 662 (C.A. 9), certiorari denied, 377 U.S. 993.

2. Petitioners' claim that they modified their literature in order to adhere to the requirements of one federal law (Federal Trade Commission Act, 15 U.S.C. 55a) only to be indicted under a different federal law (the mail fraud statute) is without merit. In 1954, the FTC requested that petitioners submit representative copies of their advertisements for a six-month period (R. 1001). Petitioners sent not only the requested materials, but also copies of letters received from satisfied students; they did not, however, send any uncomplimentary letters (R. 1108), such as those which claimed misrepresentations by salesmen (R. 1107). Only once, in 1954 or 1955, did an investigator visit petitioner; all other communications between petitioner and the FTC were by mail (R. 1106). At the time of trial, the Federal Trade Commission had not rendered an adjudication in peti-

tioners' case, but was still in the process of investigation (R. 997).

Prior to that time the Commission had stated, in *National Institute of Practical Nursing*, 48 F.T.C. 1253, 1261:

> The designation of "practical nurse" when applied to one who acquired it by attending a school means, in its full sense, one who has satisfactorily completed a full time, nine months' course of instruction which includes a substantial amount of time in a hospital or other institution for the care of the sick, with work under supervision at the bedside of patients therein. This course of instruction falls far short of such a curriculum. The use of respondents of the term "complete" to describe their course in practical nursing is misleading, as is their designation of graduates of the school as "practical nurses," "trained practical nurses," and "graduate practical nurses."

In the above cited case and in three others, *Washington Institute of Practical Nursing*, 51 F.T.C. 301; *Wayne School, Inc.*, 53 F.T.C. 428; and *Post Graduate Hospital School of Nursing, Inc.*, 53 F.T.C. 432, activities similar to those carried on by petitioners herein were declared unlawful. In *W. L. Schulze, T/A Chicago School of Nursing*, 54 F.T.C. 1754, relied upon by petitioners, the respondents had changed their terminology from "practical nurse" to "auxiliary nurse" prior to the issuance of the complaint. The government conceded that the respondents were not representing that their course qualified graduates for licenses, and in fact "specifically advised all applicants that the course did not so qualify graduates" (54

F.T.C. at 1759); no such disclaimer was made here. At all events, testimony by Adams concerning the FTC's investigation was introduced at trial for whatever merit it might have on the issue of specific intent to defraud, and the court rendered a proper and adequate instruction which petitioners do not challenge (R. 1000). This testimony was but a small part of the overall evidence on intent which the jury had before it (see the court's instructions, R. 1374).

3. Petitioners' reliance upon *American School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94,[1] misconceives the charges in this case. The government's case was not based on any theory that practical nursing correspondence schools are worthless, but on the theory that petitioners knowingly misrepresented the nature of their training and its utility in obtaining employment. Evidence that, in the opinion of experts, practical nursing could not be taught by correspondence was obviously relevant to a consideration both of the validity of petitioners' representations that persons who completed the course would be highly trained and well qualified and to the issue of intent.

Petitioners' claim that this federal prosecution under the mail fraud statute was a device used to establish minimum standards for the training of practical nurses in the State of Texas is likewise specious. This prosecution did not have the purpose

[1] This Court there reversed a conviction on the ground that the practice of faith healing alleged to be illegal was subject to honest differences of opinion, and there existed no standard of absolute truth by which to prove the appellants' assertions false and fraudulent.

or effect of outlawing or federally regulating practical nursing schools. Petitioners are being punished for having used the United States mails to fraudulently misrepresent to "the gullible, the ignorant and the over-credulous as well as the more skeptical" the training that they offered. See *United States* v. *Sylvanus,* 192 F. 2d 96, 105 (C.A. 7), certiorari denied, 342 U.S. 943.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

WARREN J. ADAMS, AND TEXAS SCHOOL OF PRACTICAL NURSING, INC., *Petitioners*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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WARREN J. ADAMS, AND TEXAS SCHOOL OF PRACTICAL NURSING, INC.

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITIONERS' REPLY BRIEF

AMENDMENT TO STATEMENT OF STATUTES INVOLVED

The petition for certiorari herein erroneously refers, in its statement of "Statutes Involved," to Section 15(a) of the Federal Trade Commission Act, 29 U. S. C. § 55(a). The reference should have been to Section 5(a)(1) of the Act, 29 U. S. C. § 45(a)(1), which reads as follows:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

ARGUMENT

I. THE STATEMENT OF FACTS IN THE GOVERNMENT'S BRIEF IN OPPOSITION OMITS THE ESSENTIAL ELEMENTS OF THE CASE.

If deliberate concealment of material facts constitutes "fraud," as the indictment in this case alleged, then the Government's Brief in Opposition might equally be regarded as fraudulent. By carefully omitting any reference to certain critical elements of the case, the Government's brief gives the entirely false impression that this is simply a routine case of mail fraud, in which the defendants were charged and convicted of nothing more than an effort to bilk the public through simple misrepresentations of objective facts. The Government's brief catalogs numerous misrepresentations which it claims the defendants made, but all of them fall into the following categories:

1) misrepresentations concerning the eligibility of the Texas School's graduates for a state license,

2) misrepresentations concerning the employment service provided by the School to its graduates,

3) misrepresentations concerning the type of instruction given to students who came to Dallas for the two weeks of classroom instruction offered to those who completed the correspondence portion of the course, and

4) misrepresentations concerning the type of employment which would be available to graduates of the course.

If this case involved nothing more than allegations and proof of a scheme to defraud involving these kinds of misrepresentations, then probably it would not be worthy of this Court's attention. But what the Government fails to mention in its brief is the fact that under the indictment and

the charge to the jury, the prosecution was not required to prove any of the misrepresentations of objective facts which are listed in the Government's brief. The jury was authorized to convict the defendants on all counts even if it found that they had made none of these misrepresentations. That is why this case is now before this Court.

As we pointed out in the petition, the case against these defendants did not rest solely, or even primarily, on allegations and proof of outright misrepresentation of objective facts, such as those dwelt on at such length in the Government's brief. Of the eight misrepresentations alleged in the indictment to constitute the defendants' "scheme and artifice to defraud," four dealt entirely with the quality and effectiveness (as distinguished from the nature) of the course of instruction offered by the defendants. These alleged "misrepresentations" were:

> "(a) that persons who completed the aforesaid course of instruction would be highly trained and well qualified practical nurses;
>
> * * *
>
> "(c) that persons completing the said course of instruction would be eligible for hospital employment in the direct attendance of the sick;
>
> "(d) that persons completing the said course would be qualified to give bedside care of the sick and carry out treatments under instructions of medical doctors;
>
> "(e) that the defendants maintain the highest of standards in facilities, staff, and personnel, and in the quality of instruction;"

The Government sought to prove that these were misrepresentations by introducing the opinion testimony of expert witnesses to the effect that practical nursing could not be taught through a correspondence course, but only through actual clinical training. These witnesses, except in one tri-

fling instance (R. 470-71), did not find any fault with quality, coverage or adequacy of the materials contained in the defendants' course. They testified that in their opinion *no* correspondence course was of value in the training of practical nurses. (R. 345, 360-63, 372, 404-08, 459-63.) *Ergo*, the Government contended, the representations made by the defendants were false.

The defense introduced the opinion testimony of other equally qualified experts who testified to the contrary. (R. 754-65, 797-807, 830-50, 927-43). One was a physician who had trained medical corpsmen in the army using a similar, but "more brief" course. (R. 927-43). But if the jury believed the Government's experts, and disbelieved the defendants', it would naturally conclude that the graduates of the defendants' course would not be "well qualified practical nurses," that they would not be "eligible for hospital employment" or "qualified to give bedside care of the sick," and that the defendants did not maintain "the highest standards . . . in the quality of instruction." And these findings, in themselves, would have been a sufficient basis for convicting the defendants on *all counts of the indictment,* even if the jury found that the defendants were not guilty of any other misrepresentations. As the trial judge charged the jury:

> "It is not necessary or essential for the government to prove in this case every element or part of the scheme to defraud alleged in the indictment, but conviction may be had upon proof of sufficient elements or parts so alleged which are adequate to constitute a scheme to defraud." (R. 1376)

In other words, under the indictment, the evidence, and the trial judge's charge, the jury was entitled to convict these defendants solely on the basis of a finding that by the very act of offering a correspondence course in practical nursing they were perpetrating a fraudulent scheme, because

practical nursing cannot be taught without actual clinical training.

The possibility that a conviction could be secured on just such a basis was called to the attention of the Government and the trial court from the beginning. The defendants filed a pre-trial motion to limit the indictment to those paragraphs which alleged a scheme to misrepresent objective facts. (R. 1484). The Government resisted, and the court overruled the motion. (R. 1488-91). And the defense also objected to the charge on the ground that it would permit a conviction solely on the basis of the jury's judgment as to the value of a correspondence course in practical nursing. (R. 1390-91). This objection was overruled.

The jury's verdict, indeed, makes it clear that it accepted the opportunity thus offered by the Government. One of the defendants was Miss Lola Opal Christal. She was in charge of instruction at the school. She was in no way involved with the business or sales aspect of the school. Yet the jury convicted her. There is only one possible explanation for that verdict—and that is that the jury must have thought that anyone connected with a correspondence course which purports to teach practical nursing is automatically guilty of fraud. The court, of course, set aside the verdict against Miss Christal, but the fact that the jury found her guilty proves, although no proof is necessary, that the jury did not base its verdict on any evidence of misrepresentations of objective facts.

The case is almost as clear with respect to the defendant Adams, the sole individual petitioner here. Adams did not own the school, or participate in its profits. He was simply a paid employee, receiving a modest salary of $15,000 to $17,000. (R. 977) His pastor testified that he was an active church-goer with an unblemished reputation for honesty and integrity. (R. 1076-77) This testimony, and that of two other character witnesses (R. 133-37) was uncontradicted. Thus, the fact that the jury found him guilty is

also a strong indication that it accepted the Government's invitation to decide this case on the basis of the merit, or lack of merit, in a correspondence school of practical nursing.

The question thus squarely posed is not—we repeat, not —whether the jury's findings as to the value of a correspondence course are correct or supported by the evidence. This is not a proceeding to enjoin the operation of the school, or to deny it the use of the mails. This is a criminal conviction for wilful fraud. The question is whether, as a matter of law, such a conviction can be based on a jury's determination of a matter of opinion on which the experts disagree, and on which the defendants' view is supported by a decision of the Federal Trade Commission.

We are not, as the Government contends, asking this Court to review the sufficiency of the evidence. Rather, we are asking the Court to decide an important question of law, involving the interpretation of the mail fraud statute in the light of the constitutional requirement that criminal statutes specify with clarity the nature of the conduct which is prohibited and punishable. Our basic contention, as more fully stated in our petition, is that a criminal conviction of wilful fraud cannot rest on proof of representations of matters of opinion, which are supported by expert testimony and a decision of the Federal Trade Commission, even though there is also opinion to the contrary which a particular jury may find more plausible.

The various alleged misrepresentations of objective facts which the Government has reviewed in its brief at such length are thus not relevant at all to the basic issues in this case. We do wish to point out, nevertheless, that the Government's treatment of this aspect of the case is also less than a model of candor. By stating only part of the evidence, the government's brief creates the impression that the defendants were plainly guilty of making numerous misrepresentations of objective facts. In the appendix to this brief, we demonstrate that there was great conflict in

the evidence on this score, and that, considering the record as a whole, it is highly unlikely that the jury would have convicted the defendants on the basis of the evidence of such misrepresentations standing alone. We have omitted this argument from the body of this brief because we believe that, in the last analysis, it is both impossible and unnecessary to determine on what basis the jury convicted the defendants. What is important is that the indictment and the charge authorized a conviction on grounds which are so novel and questionable that they are deserving of review by this Court.

II. THE GOVERNMENT'S ARGUMENT THAT THE VERDICT IN THIS CASE IS CONSISTENT WITH APPLICABLE DECISIONS OF THE FEDERAL TRADE COMMISSION IS BASED ON A MISREADING OF THOSE DECISIONS.

One of the questions raised by the petition for certiorari is whether, as a matter of law, a conviction under the mail fraud statute can be based on conduct which the Federal Trade Commission has held not to constitute "unfair or deceptive acts or practices in commerce." It is our contention that the element of "wilfulness," which is an essential element of the crime of which the petitioners were convicted, cannot as a matter of law be found to exist in such circumstances. (See Petition for Certiorari, pp. 30-35)

In an effort to remove this fundamental issue from the case, the Government contends that the present convictions are consistent with the applicable decisions of the Federal Trade Commission, citing *National Institute of Practical Nursing*, 48 F.T.C. 1253; *Washington Institute of Practical Nursing*, 51 F.T.C. 301; *Wayne School Inc.*, 53 F.T.C. 428; and *Post Graduate Hospital School of Nursing, Inc.*, 53 F.T.C. 432. All of the decisions relied on by the Government, however, were rendered prior to the decision on which we relied in the petition for certiorari, *W. L. Schulze, T/A*

Chicago School of Nursing, 54 F.T.C. 1754, and with one exception *(National Institute of Practical Nursing)* they were not actually litigated, but involved only consent orders. Moreover, the *Schulze* case, in addition to being the Commission's latest decision concerning correspondence schools for practical nurses, is also its most definitive statement on the subject. In it, the Commission explains that the basis for its earlier decisions (cited here by the government) was that the schools involved in those cases had represented that their graduates would be qualified for state licenses. This finding, the Commission explained, "necessarily rendered most of the other representations [involved in those cases] false." On the other hand, the Commission explained, similar representations were found not to be false in the *Schulze* case because they were not accompanied by any misrepresentation concerning licensing. Thus, the Commission pointed out, "most of respondents' representations alleged in the complaint unquestionably would be false if respondent were representing their course as qualifying graduates to be licensed practical nurses." But, continued the Commission, the absence of any misrepresentation concerning licensing "in effect destroyed the basis for alleging most of the [respondent's other] representations to be false. While such representations would have been false if respondents had claimed that their course qualified graduates for licensure, it will be seen that in the absence of such a claim and proof of the contrary, such representations, with one exception, are in fact true and correct." 54 F.T.C. at 1759-60.

In an effort to distinguish the facts of this case from the facts of the *Schulze* case, the government refers to the fact that the respondents in *Schulze,* prior to the commencement of that case, began using the term "auxiliary nurse" instead of "practical nurse" in their promotional material. As the Commission's opinion makes clear, however, this was done to avoid confusion with the term "licensed practical nurse"

which is used in many state licensing statutes, including the one in Illinois where the school involved in *Schulze* was located. The School involved in the present case, however, is located in Texas, and the Texas law does not use the term "licensed practical nurse," but rather "licensed vocational nurse." The Commission itself recognized in *Schulze* that in a state such as Texas the term "practical nurse" would not be misleading:

> "Historically speaking, the term 'practical nurse' applied to one who was neither formally trained nor licensed, and was developed to distinguish this group from registered professional nurses. If the licensure laws had adopted a different term, such as is the case in Texas and California where they are called 'licensed vocational nurses,' some of the confusion in terminology would have been obviated." 54 F.T.C. at 1758.

It is thus crystal clear that the present convictions cannot be reconciled with the applicable decisions of the Federal Trade Commission, unless it is assumed that the jury's verdict rested on a finding that the defendants in this case—unlike the respondent in *Schulze* but like the respondents in the other FTC cases—represented that their course would qualify its graduates for a license. As we have seen, however, such an assumption simply cannot be made in the light of the indictment, the evidence, and the charge in this case. As we have demonstrated, the jury in this case was authorized to convict the defendants even if it found that they had not made any misrepresentations concerning licensure. In other words, the jury was authorized to find these defendants guilty of wilful fraud entirely on the basis of conduct which the FTC has held not to constitute an unfair or deceptive practice in commerce. Whether such a conviction is permissible under the statute, particularly in the light of the constitutional requirement that criminal statutes be clear

and specific, is a question of fundamental importance which is squarely raised by this case, and which should be decided by this Court.

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APPENDIX

IT IS HIGHLY UNLIKELY THAT PETITIONERS WOULD HAVE BEEN CONVICTED IF THE GOVERNMENT'S CASE HAD CONSISTED SOLELY OF THE KIND OF ALLEGED MISREPRESENTATIONS RELIED ON BY THE GOVERNMENT'S BRIEF.

As we have indicated in Part I of this reply brief, the Government's brief dwells entirely on that aspect of this case which involved allegations and evidence that the defendants had misrepresented certain objective facts. Although that part of the case is not really pertinent to the basic questions raised in the petition, we believe that the Court, in determining whether to grant certiorari, may wish to be informed as to how strong that part of the case really was. The Government's brief, of course, recites only the evidence most favorable to the prosecution. If the *whole* evidence is considered, a quite different picture emerges.

1. The Alleged Misrepresentations Concerning the Eligibility of Graduates of the Defendants' School for a State License.

The Government's brief states that some of the defendants' salesmen "left the impression with many students that graduation from the school meant that a person was a licensed nurse or could take the State examination to become one." (p. 5) It is true that the Government did produce a few former students who so testified, but their testimony did not fare too well. For example, one clearly admitted on cross examination that she did not understand the difference between a license and a diploma:

> "Q. Now, do you know the difference between a license and a diploma?
>
> "A. I didn't know at that time.
>
> "Q. All right. So Mr. Burns [a salesman] might have said license or might have said diploma and you didn't know the difference, isn't that right?

"A. Well, I just took it for license, like when a doctor practices and gets his license then he got the license.

"Q. You said you didn't know the difference between a license and a diploma, is that correct?

"A. I didn't know you had to go and get a license from the State of Texas. I learned it later, see." (R. 28)

Another witness was impeached by her own signed pretrial statement in which she had admitted that she understood the difference between an (unlicensed) practical nurse and a (licensed) vocational nurse when she signed up for the course, and that "I have found no reason to feel that anything was misrepresented to me." (R. 875-76) Still another admitted on cross-examination that all she remembers having been told by the salesman was that she would be "next to an L.V.N." (meaning Licensed Vocational Nurse), and that she understood that "next to" means "below an L.V.N." (R. 164-65).

Moreover, many of the former students called by the Government didn't even claim that they were told that the course would qualify them for a license, but testified only that they were not told anything about licensing one way or the other. (R. 46, 54, 58, 98, 145, 216).

But even if one or two salesmen had made misrepresentations concerning licensing, this plainly would not make the defendants in this case guilty of mail fraud, unless it were also shown that the defendants had somehow authorized or condoned such misrepresentations as part of a "scheme to defraud." On this question, the evidence showed that every salesman had been required to sign a contract of employment (Def. Ex. 33, Ex. Vol. 176) and a memorandum of instructions (Def. Ex. 34, Ex. Vol. 177) enjoining them to make no misrepresentations. Indeed, the memorandum

of instructions specifically contained the underscored directive:

"Do not promise licensure in any state."

The Government's brief states that "if a complaint was received from a student residing in a State which required all practical nurses to be licensed, White [the employee in charge of handling such correspondence] was instructed to be evasive in his reply." In support of this statement, the Government cites page 562 of the Record. Yet on that very page of the record, as well as on pages 563, 517, and 549, White, who was a Government witness, admitted that his practice was to inform all students from "mandatory" states that their state required all practical nurses to obtain a license, and that the course offered by the school would not qualify them for such a license. The form letter which White testified he was instructed to use for that purpose states:

> "The state of Louisiana offers a mandatory law which requires any person practicing Practical Nursing to obtain a license. Since our course of instruction will not qualify you for the examination your state offers, we feel that it is necessary to advise you of this fact before sending you your instructional material." (Def. Ex. 28, Ex. Vol. 168)

What could be less evasive?

The Government makes much in its brief of the experience of Lula May Robertson, the only student from a "mandatory" state who apparently took the course in a mistaken belief that it would qualify her for a license. On cross-examination, it appeared that this witness lived near the Texas border, and learned about the course as a result of reading the School's advertisement in a Texas newspaper. (R. 241) It was undisputed that the School did not advertise in Louisiana or any other state which required practical nurses

to be licensed, and that the School's policy was not to knowingly accept enrollments from such states unless the student was first specifically informed that the course would not qualify her for a license. (R. 1084) Adams' explanation that the isolated case of Mrs. Robertson was nothing more than an error (R. 1084) seems eminently reasonable, and must have seemed so to the jury, since it was the only one the Government was able to find. There is simply no basis for the Government's statement that the experience of Mrs. Robertson was "typical."

Finally, the record clearly establishes that no student could have been misled on this question of licensing any time after 1959. For in that year, the school revised its "Student Verification Questionnaire" by adding the following question:

> "Do you understand this course of training does not intend to qualify you as a licensed practical nurse, but is offered for its educational qualities?"

Every potential student was required to answer the questionnaire in writing. Nevertheless, the jury found a "scheme to defraud" which continued until 1962, the date covered by Count 18 of the indictment. This strongly indicates that the "scheme to defraud" found by the jury did not involve wilful misrepresentations by the defendants concerning licensing, since the record clearly shows that, at least since 1959, they made every possible effort to inform students of the facts in that regard.

2. The Alleged Misrepresentations Concerning the Employment Service Offered to Graduates of the School.

The Government's brief states that "another enticement was the offer of a free employment service, which guaranteed the graduate a job." (p. 5) It is true that the School offered to assist its graduates in finding employment. But the fact is that the School did provide such assistance. And

every student was informed, through the Student Verification Questionnaire (both prior to and after the 1959 revision) that "our placement service is not a guarantee of work." (Def. Ex. 47, Ex. Vol. 188; Def. Ex. 46, Ex. Vol. 186). The indictment did not even allege that the defendants guaranteed employment to anyone.

The Government's brief erroneously states that the placement service consisted of nothing more than "a form letter *issued to the students* who passed the course, praising her as industrious, dependable, and conscientious, and setting forth her 'scholastic average.'" (Brief in Opp. 7) The evidence shows, that these letters of recommendation were sent to potential employers, not simply issued to the students. (R. 523-24) In addition to sending such letters, the School placed classified advertisements in newspapers for graduates who were seeking employment.

It is true, as the Government states, that James White testified that he suggested certain improvements in the employment service, but his suggestion also involved charging an additional fee for this service. (R. 523-24) This suggestion was rejected by the President of the School, David Miller, because "he did not want the graduates to pay for employment." (R. 1062) White's testimony that Miller expressed disinterest in whether graduates obtained employment or not was flatly contradicted by Adams. (R. 1062)

3. The Alleged Misrepresentations Concerning the Nature of the Instruction Offered by the Defendants.

The Government's brief states that students "were told that they would receive hospital training" (p. 5) during the two-week training period offered at the end of the correspondence course, but in fact they "spent that time at the school practicing on dummy patients or viewing movies or lectures by milk salesmen" or touring the Dallas Health Museum, "a free public building." (p. 7)

The Government does not mention, in its brief, the un-

disputed fact that at one time actual clinical training at Dallas General Hospital was included in the two-week program, but was discontinued when the hospital entered a program for the training of licensed vocational nurses. At that time all references to hospital training was eliminated from the school's literature and sales materials. (R. 1080-81)

After that time, the two-week program consisted primarily of classroom training and practice, under the supervision of registered nurses. The students spent 40 hours per week in class, during which time almost all the skills covered by the correspondence portion of the course were demonstrated and practiced by the students, either on each other or on a dummy identical to one used in the training of professional registered nurses.* They practiced bedmaking (R. 835), taking of pulse, temperature and respiration (R. 836-37), bathing patients (R. 837), administration of enemas (R. 837-39), first aid (R. 839-40), administration of hypodermic shots (R. 841-43), taking blood pressure (R. 898), catheterization (R. 898), administration of insulin (R. 898-99), administration of oxygen (R. 900-901), etc. Occasionally, a physician would deliver a lecture (R. 333-34, 441-47), or a milk salesman would demonstrate the preparation of infant formulas. The tour of the Health Museum was led by one of the instructors, and served the purpose of acquainting the students with such things as the appearance of certain disease symptoms (illustrated at the museum by wax dummies), the various stages of pregnancy (illustrated by molds), surgical procedures (illustrated by huge pictures), etc. (R. 895-97)

Nothing in the indictment even alleges that the defendants misrepresented this aspect of their course, and there is no basis in the record for any finding that they did so.

* The deceptive nature of the Government's brief is illustrated by its disparging reference to these "dummy patients." The fact is that they are not mere toys, but specially constructed dummies, with all orifices, etc., and are used in all nursing schools throughout the country. Student nurses everywhere know them as "Mrs. Chase." (R. 838)

4. The Alleged Misrepresentations as to the Nature of the Employment Opportunities Available to Graduates of the Defendants' Course.

The indictment alleged that the defendants had falsely represented that its graduates "would be in demand for employment and would be readily employed in a skilled capacity as a nurse at a greater pay rate than nurse's aide, and earning up to $12 per day." (R. 1465) Echoing this allegation, the Government's brief states that "students were also told . . . that after graduation they could get jobs in any hospital." (Br. in Opp. 5) What the Government's brief neglects to mention, however, is that there is indisputable evidence in the record that graduates of the defendants' school did obtain employment in hospitals.

Dr. Jack Arthur Bergfeld, who operates the Comal Sanitarium and Hospital in New Braunfels, Texas, testified that graduates of the school had been employed by the hospital as practical nurses, that they had been competent, and that "I'll take any and all you can send me." (R. 932) In addition, a number of graduates of the school testified that they had found employment in Dallas Medical & Surgical Hospital, Baylor Hospital, Gaston Hospital, the Recovery Center, St. Paul's Hospital, Dallas Osteopathic Hospital, Methodist Hospital, Scottish Rite Hospital, Doctors' Hospital, North Houston Hospital, Lockwood Hospital, and others. (R. 779, 788, 852-53, 864, 881-82, 1041, 1137-38). These graduates all testified that they were entirely satisfied with the course, that it had adequately prepared them for their chosen occupation, and that they had no complaints.

It is true that a few graduates of the school, who testified for the prosecution, stated that they had not been successful in finding employment. But there is no basis for any finding that their experience was "typical" as the Government claims. There are some graduates of Harvard Law School who never find employment as lawyers, but that does not mean that the school is committing fraud when it claims to

offer a training course for lawyers. The fact is that innumerable graduates of the Texas School did obtain employment as practical nurses. That fact is established not only by the testimony summarized above, but also by the many testimonial letters received by the school and included in the material submitted to the Federal Trade Commission. (Def. Ex. 41, pp. 166-295) It is therefore inconceivable that the jury could have found that the defendants committed a fraud by representing that graduates of their course could obtain employment as practical nurses in hospitals or elsewhere.